88-1285

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals err by failing to remand this case to the National Labor Relations Board because the Board failed to apply its mandatory *Wright Line*[1] analysis and to determine whether the Employer who terminated an employee for good cause, namely willfully taking an unauthorized leave of absence after she was warned that she would be terminated if she left, would have terminated her even absent her protected activity?

2. Did the Court err in upholding the Board's determination that the termination of the employee for willfully taking an unauthorized leave of absence after she was warned that such action could result in termination violated the National Labor Relations Act?

3. Did the Court of Appeals err by enforcing the order of the National Labor Relations Board that a secretary who had access to confidential information and typed memoranda concerning labor relations and collective bargaining was not a confidential employee?

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[1] 251 NLRB 1083, 105 LRRM 1169 (1980), *enf'd*, 662 F.2d 889, 108 LRRM 2513 (1st Cir. 1981), *cert. denied* 455 U.S. 980, 109 LRRM 2779 (1982). *See, NLRB v. Transportation Management*, 102 S.Ct. 2469, 113 LRRM 2857 (1981).

PARTIES TO PROCEEDING

The parties to this proceeding are Petitioner, Intermountain Rural Electric Association,[2] and Respondent, National Labor Relations Board. The charging party was the International Brotherhood of Electric Workers, which was a party to the proceedings before the Administrative Law Judge.

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[2] Rule 28.1 is not applicable.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Intermountain Rural Electric Association ("IREA"), respectfully prays that a writ of certiorari issue to review two judgments and opinions of the United States Court of Appeals for the Tenth Circuit enforcing in part an order, and enforcing a supplemental order issued by the National Labor Relations Board against Petitioner, Intermountain Rural Electric Association.

OPINIONS BELOW

The opinions of the Court of Appeals, 732 F.2d 754 (10th Cir. 1984) and ___ F.2d ___ (10th Cir. 1988), are attached as Appendix B and Appendix E. Copies of the orders denying IREA's Petitions for Rehearing are

attached as Appendix C and Appendix F. The January 9, 1981 Decision and Order of the National Labor Relations Board is contained at Appendix A-1 and is reported at 253 NLRB No. 164, 106 LRRM 1087. The October 29, 1985 Decision and Order of the National Labor Relations Board on remand is contained at Appendix D and is reported at 277 NLRB No. 3, 120 LRRM 1245. The unreported Decision of the Administrative Law Judge in Case Nos. 27-CA-6151, 27-CA-5280 and 27-CA-6305 was incorporated into the Initial Decision and Order of the NLRB and appears in Appendix A-2.

GROUNDS FOR JURISDICTION

The Court of Appeals for the Tenth Circuit entered its first judgment on April 16, 1984. Petitioner filed a Petition for Rehearing on April 30, 1984. The Court of Appeals denied the Petition for Rehearing on June 1, 1984. Petitioner filed a Petition for Writ of Certiorari in August, 1984, which this Court denied on October 29, 1984. The NLRB argued at the time of the 1984 petition that one of the issues that is the subject of this Petition, whether the Board appropriately applied the *Wright Line* analysis, was not ripe for review. After remand to the Board and further appeal, the Court of Appeals for the Tenth Circuit entered its second judgment on November 4, 1988. Petitioner filed a Petition for Rehearing on November 17, 1988. The Court of Appeals denied the Petition for Rehearing on November 29, 1988. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1) and (3); and

Section 10(c), 29 U.S.C. § 160(c). These provisions provide in pertinent part:

> § 158(a) It shall be an unfair labor practice for an employer – 1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in § 157 of this title; . . . 3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization, . . .
>
> § 160(c) . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or payment to him of any back pay, if such individual was suspended or discharged for cause.

STATEMENT OF THE CASE

Petitioner, Intermountain Rural Electric Association ("IREA") is a Colorado corporation which provides electric power. In February, 1979, Local 111 of the International Brotherhood of Electrical Workers filed a petition with the NLRB to represent clerical and office workers at IREA. The election was conducted on April 13, 1979, and Local 111 was certified as the bargaining representative for the clerical union in 1979. The issues pertinent to this petition involved the suspension and termination of Katherine Tate.

Suspension of Tate

Katherine Tate was employed as a confidential secretary to the Director of Engineering at IREA. As part of her job function she relieved the switchboard operator. On July 3, 1979, an irate customer whose power had been cut off left two bags of spoiled food in the vicinity of the switchboard. (R.Vol. I, pp. 553-54) Shortly thereafter, Tate had an argument with Spencer Cronk, Assistant Director

of Operations, regarding who was to dispose of the garbage. When the argument was not resolved to her satisfaction, Tate immediately stood up, packed up all her belongings, left the switchboard, and disappeared down the hallway. (R.Vol. I, p. 555) Mr. Cronk reported the matter to Michael Deans, Tate's regular supervisor. Mr. Cronk suggested some disciplinary action be taken. Mr. Deans interviewed Tate on the afternoon of July 3rd. On July 5, 1979, the next work day, Mr. Cronk, in Mr. Deans' absence, issued Tate a letter of reprimand and suspended her for three working days. (R.Vol. I, p. 560, R.Vol. III, p. 1274)

The NLRB, adopting the findings of the Administrative Law Judge, found this incident to be a joke. Tate, contrary to the Board's conclusion, testified she was quite serious when she directed Mr. Cronk to remove spoiled food from the waiting room. (R.Vol. I, p. 163) She also admitted she volunteered the information to her supervisors, Mr. Deans and Mr. Cronk, that she was a strong union supporter. (R.Vol. I, pp. 150-51)

Termination of Tate

Tate was scheduled to return to work from the suspension on July 10, 1979. She appeared that afternoon in Mr. Deans' office and gave him a letter on the stationery of "North Medical Clinic" purportedly signed by "Sherwin Zalman." The letter, dated July 9, 1979, was addressed to "To whom it may concern" and contained a "recommendation" that Tate be given a one-week leave of absence because of "health problems." (R.Vol. I, p. 698; G.C.Ex. 17) Tate told Mr. Deans she wished to commence a week's leave of absence immediately (R.Vol. I, p. 175), without further explanation other than the Zalman letter.

Tate provided no explanation to her supervisor for the leave request, and the record contains no evidence that a medical emergency existed.

Mr. Deans conferred with his supervisor, who referred him to Stanley Lewandowski, General Manager of IREA. (R.Vol. I, p. 451; R.Vol. II, p. 1025) The personnel policies at IREA provided that only the General Manager could approve a leave of absence. (R.Vol. II, p. 715, G.C.Ex. 19) Mr. Lewandowski, confused by the vagueness of the letter, called the clinic, which informed him Dr. Zalman was a gynecologist. (R.Vol. I, p. 402) Thereafter, he conferred with Mr. Deans regarding the need for Tate's services and discovered that a substantial amount of work had backlogged, particularly because of the three-day suspension. (R.Vol. I, p. 404) Mr. Lewandowski also discussed a previous conversation with Mr. Deans that Tate was planning a trip out of town although she had no accrued vacation time. (R.Vol. I, p. 404)

IREA employees seldom request leaves of absence, and they are seldom granted. The previous month Mr. Lewandowski refused a leave of absence request by a long-time supervisor, Susie Holman, who resigned as a result of the denial. (R.Vol. I, p. 407) In light of all the circumstances, Mr. Lewandowski denied Tate's request for a leave based on the immediate need for her services; because there was no indication a traumatic emergency existed; because Tate had indicated she was planning a trip although she had no vacation or leave time coming; and for lack of notice to the company. (R.Vol. I, p. 405)

Mr. Deans informed Tate of the company's decision and directed her to commence work. (R.Vol. II, p. 1028) Tate simply stated she would follow her doctor's orders and commenced to leave. (R.Vol. I, p. 137; R.Vol. II, p. 1028) Mr. Deans warned her she would be fired if she left without permission. Nevertheless, she departed the

premises. (R.Vol. II, p. 1029) Tate failed to return for work for the following three days, and Mr. Deans terminated her for being absent without permission. (R.Vol. II, p. 1031)

Tate admitted in her testimony that she had been planning a trip out of town during the week of July 10 to July 17, although she had no vacation or leave time accrued. (R.Vol. I, pp. 139, 180) She further admitted she received the note from her doctor approximately 1:00 p.m. on July 9, 1979, but despite the alleged medical necessity, never informed anyone at IREA she would be requesting an immediate one week leave until she appeared at work the following day at about 1:00 p.m. (R.Vol. I, p. 175) She admitted she gave no explanation whatsoever to Mr. Deans why she needed the time off, nor did she authorize Mr. Deans or anyone else at IREA to contact her doctor. She further admitted Deans informed her that her leave had been denied and if she left work without permission or did not return immediately, she might be terminated.

The Board found IREA did not sufficiently investigate Tate's request. It held that the employer used the request as an excuse to get rid of a troublesome employee. (R.Vol. I, p. 176) The Board did not contradict the evidence that Tate took an unauthorized leave. Contrary to the Board's decision, IREA obviously had legitimate grounds for terminating Tate.

Confidential Status of Tate

Katherine Tate was a confidential secretary to Mr. Michael Deans, Director of Electrical Engineering. Tate worked for Mr. Deans for approximately eight months before she was terminated. As Director of Electrical Engineering, Mr. Deans fulfilled an important role in the formulation, effectuation and implementation of labor

relations policy at IREA. He was responsible for virtually all labor relations matters within the engineering department. (R.Vol. I, pp. 392-94) These responsibilities included formulation of recommendations regarding staff salary, changes and revisions in contract language, and policy regarding any matter affecting the staff of the engineering department in labor relations areas. (R.Vol. I, p. 447) He was responsible for a large number of employees who were members of the outside collective bargaining unit, and he maintained similar responsibilities with regard to the newly certified "inside unit." (R.Vol. I, pp. 392-93; R.Vol. II, p. 782)

While collective bargaining negotiations had not occurred during the period in which Tate worked for Mr. Deans, other matters relating to labor relations transpired. The General Manager, Mr. Stanley Lewandowski, testified that as Director of Electrical Engineering, Deans was responsible for all employees within the electrical engineering department, including those belonging to the unit represented by IBEW, with which the company had an existing collective bargaining agreement. Mr. Deans was responsible for handling all grievances, for supplying information relative to negotiations, and he could possibly sit at the negotiating table in connection with these employees. (R.Vol. I, p. 393)

An IREA memorandum setting forth labor relations responsibilities of key administrators specified Deans had authority to settle union grievances. (IREA Exhibit 17, p. 3; R.Vol. II, pp. 780-84) The memorandum further specified that if the additional bargaining unit became effective, office employees and draftsmen would become part of the unit, and Deans would have responsibility for formulating labor relations policy with regard to those

employees. The memorandum also stated all recommendations regarding labor relations should be in writing. Additionally, the department heads, of which Deans was one, were to conduct meetings with their own supervisors on contract strategy and grievance settlement, and minutes of such meetings were required to be kept. The bargaining unit for clerical employees was certified, and bargaining occurred. (IREA Exhibit 17, pp. 3-4; R.Vol. I, pp. 780-84)

In her capacity as confidential secretary to Mr. Deans, Tate typed a variety of confidential memoranda relating to IREA's position on issues being negotiated with the union. These included whether meter readers and field engineers should be in the existing bargaining unit; a wage proposal for draftsmen which was prepared for upcoming contract negotiations; and a memorandum concerning IREA's position in an NLRB investigation. (IREA Exhibit 27, pp. 6-8, 10-11; R.Vol. III, pp. 1000-02, 1004-5) Mr. Deans testified his secretary was a "confidential secretary." (IREA Exhibit 27, p. 6; R.Vol. II, p. 1000) The basis for his statement was the work that she did for him relating to labor relations within the company. (IREA Exhibit 27, pp. 9-11; R.Vol. III, pp. 1003-05)

Mr. Fred Williams, Assistant General Manager and Deans' immediate supervisor, testified Deans had responsibility for the engineering aides in the existing bargaining unit. (R.Vol. I, p. 446) Williams testified Deans made recommendations on salary and contract language for impending negotiations, and the recommendations were contained in typewritten memoranda. (R.Vol. I, p. 447) Williams stated Deans made written recommendations on salaries for engineering aides for upcoming negotiations with the existing unit. (R.Vol. I, p. 461) Of particular importance is the fact that in the absence of Mr. Williams'

secretary, Tate took notes at the combined meeting of the engineering and operations staffs, which were held on a monthly basis and were attended solely by supervisors. (IREA Exhibit 27, p. 11) The meetings included discussions of labor relations strategy. (IREA Exhibit 22, pp. 174, 176)

Mr. Richard Prahl, Supervisor of Engineering Services for IREA, testified Ms. Tate performed secretarial work for him and typed at least one memorandum on labor relations, which he sent to Thomas Riffe, Director of Personnel. (IREA Exhibit 21; R.Vol. II, p. 512) The memorandum included recommendations on the health insurance benefits that should be paid for the inside bargaining unit in preparations for impending labor negotiations with the inside unit. (IREA Exhibit 21) Mr. Riffe was a member of the management team preparing for those negotiations. Mr. Prahl testified he had responsibility for engineering aides I and II, who were members of that "inside bargaining unit." (R.Vol. II, p. 509)

The existing collective bargaining agreement (Gen. Counsel Exhibit 1) specified the supervisor and appropriate manager would be involved in the grievance process, in an effort to resolve any such grievance. The article on grievances, Article 35, Section A3, stated that in Step III the union shall meet with a representative of management in an effort to resolve the grievance, and the response shall be given in writing. Exhibit 17, previously referenced, stated Mr. Deans was a management representative regarding all employees for grievances for engineering section employees. He would therefore be involved in processing any grievances of those employees. Mr. Lewandowski confirmed Mr. Deans was the IREA representative with authority to resolve grievances. (R.Vol. I, p. 392) Without reservation, Ms. Tate

would type the decisions regarding any grievances, and would obviously know the company's position before publication. (R.Vol. I, pp. 122, 171)

The job description for the secretary to the director of electrical engineering specified among its duties and tasks, the following:

> 7. Prepares confidential minutes taken at meetings involved in highly sensitive labor relations matters.
> 8. Prepares recommendations provided by the director of electrical engineering concerning confidential labor relations matters.

(IREA Exhibit 27, Attachment I; R.Vol. III, p. 1000) Significantly, this job description was prepared and became effective February 1, 1979, before the facts involving Tate's discharge arose.

Despite the fact Ms. Tate testified at length before the Administrative Law Judge, neither the Board's general counsel nor the attorney for the charging party elicited any evidence to contradict the overwhelming evidence presented by the employer during the Unfair Labor Practice proceeding that Tate was a confidential secretary with a labor nexus. Tate's only testimony on this issue was given in the representation hearing. (The transcript of the hearing is IREA Exhibit 22)

Ms. Tate testified at the representation hearing that she was only on the job three months and was not at all familiar with it. However, in her cross-examination she admitted she was informed she would have access to confidential information when she was hired by IREA. (Exhibit 22, p. 175) Although she initially denied she had any responsibility for attendance at meetings involving labor relations, she again admitted on cross-examination that one of her functions was to attend and take minutes at the management meetings when Mr. Williams' secretary was absent. (Exhibit 22, pp. 174, 176) In fact, despite

a relatively short term of employment with the company, she testified she attended a management meeting with Mr. Deans. Also present were Mr. Williams, and Mr. Cowan, Assistant to Mr. Williams. Confidential labor relations relating to the employer's strategy in policy with regard to the existing bargaining unit were discussed at that meeting. (Exhibit 22, pp. 174, 176) In line with her job description, Tate kept minutes of that meeting as part of her job as secretary to Mr. Deans.

At the representation hearing, Thomas Riffe, Director of Personnel, confirmed the responsibilities of Katherine Tate regarding performance as a secretary for one of the employees responsible for IREA's labor relations. (Exhibit 22, pp. 33-34, 42) Riffe also confirmed Mr. Deans was one of the five individuals at IREA responsible for formulating labor relations strategies. (Exhibit 22, pp. 43, 55-56, 62) Spencer Cronk, Assistant Director of Operations, corroborated this testimony at the representation hearing. (Exhibit 22, pp. 117, 120-22)

The Acting Regional Director's Supplemental Decision on Challenged Ballots reflected Tate's confidential status. (IREA Exhibit 23) Footnote 1 of the Decision indicated Tate informed the NLRB investigator that she recalled " . . . typing three memos or letters which could even arguably be construed as relative to confidential labor relations matters." (Exhibit 23, p. 2, n. 1; R.Vol. III, p. 970) One memorandum stated the employer would deal with the union at arm's length; the second involved taking meter readers out of the existing unit and putting them in the new office and clerical unit; and the third involved the experience required to progress to classifications of warehouseman and groundman, classifications present in the existing bargaining unit. The second memorandum also involved strategy regarding upcoming negotiations

with the union, with which Tate was aligned. The third involved a possible area of negotiations and an issue that had been the subject of a grievance and arbitration.

To summarize, the facts showed Katherine Tate was informed her job was confidential. By reason of notetaking and typing, she had access to minutes of at least one high level management meeting in which company strategy with respect to negotiations with the union were discussed. She also typed memoranda regarding the company's position on bargaining, and with respect to criteria for promotion to categories within the bargaining unit, as well as an issue involving a grievance. She typed memoranda on confidential labor relations for Mr. Prahl and for Mr. Deans, and would have continued to have done so, but for her termination. Given these undisputed facts, Katherine Tate was a confidential secretary with a labor nexus.

Procedural History

The Administrative Law Judge found in his order of September 29, 1980, that IREA violated § § 8(a)(1) and (3) of the National Labor Relations Act in the suspension and termination of Tate. He found Tate's actions in leaving her position of responsibility represented "just goofing around," and the reason for her suspension was her known support for the union. (R.Vol. III, p. 1278) (Appendix A-2, p. 37) With respect to Tate's unauthorized leave of absence, the judge concluded IREA denied the leave so it would have a "sure fire chance to terminate her for 'insubordination'." (R.Vol. III, p. 1279) (Appendix A-2, p. 37) Although no employee had ever been granted such a leave, the judge did not decide whether the company would have suspended and terminated Tate in the absence of her union sympathies.

The NLRB adopted its *Wright Line* test five weeks before the Administrative Law Judge's decision.[3] In its exceptions and brief to the Board, IREA argued the *Wright Line* analysis must be applied. In a decision and order dated January 8, 1981, the NLRB affirmed the rulings, findings and conclusions of the Administrative Law Judge and adopted his recommended order. The Board did not analyze whether the actions taken by IREA would have been taken in the absence of activity purportedly protected by the National Labor Relations Act. Despite the fact that the Board had adopted the *Wright Line* test, and though IREA requested the Board apply its own test, the Board never even referred to the *Wright Line* test!

The Court of Appeals for the Tenth Circuit issued its opinion on April 16, 1984. It conceded the Board did not follow the analysis promulgated in *Wright Line* to find whether the suspension and termination of Tate would have been taken regardless of illegal motivation. However, it held that the employer could not have prevailed on a *Wright Line* analysis because its actions were pretextual. (Appendix C, pp. 10-11, 19) The Court of Appeals remanded to the NLRB the issue of whether Tate was a confidential secretary and covered by the Act, since the ALJ refused to allow IREA to litigate that issue. The Court held the Board must determine the confidential status issue in the first instance. (Appendix B, p. 15)

On remand, the Board did not hear additional evidence on the confidential secretary issue. The parties submitted briefs based on the record before the Board.

The Board issued its order on October 29, 1985. (Appendix D) It found that there was an insufficient labor

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[3] 251 NLRB 1083, 105 LRRM 1169 (1980).

nexus between Tate and confidential labor relations information, so as to confer confidential secretary status on her. The Board's opinion placed greater emphasis on the labor relations responsibilities of Tate's supervisors to the time of her termination than the future role these employees would play in the labor relations and collective bargaining processes.

The Court of Appeals for the Tenth Circuit enforced the Board's decision, and essentially reiterated its findings. (Appendix E) On November 29, 1988, the Tenth Circuit denied IREA's Petition for Rehearing. (Appendix F) It rejected the company's argument that its decision conflicted with the case of *Prudential Insurance Company v. NLRB*, 832 F.2d 857 (4th Cir. 1987), which found confidential employee status under circumstances in which the employee at issue had far less access to confidential labor relations decisions and documents than did Ms. Tate.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Decision Conflicts With The Decisions Of The National Labor Relations Board, Decisions In Its Own Circuit, Decisions Of Other Courts Of Appeals And The Supreme Court Of The United States.

In this case, IREA advanced legitimate business justification for terminating its employee. The employer suspended Tate for walking off the job during working hours, and terminated her for taking an unauthorized leave of absence after she had been warned that such conduct would result in discharge. As cited in the Statement of the Case, the employer produced substantial evidence to support the justification for these actions, and articulated reasons that show that other employees acting in a similar fashion would be similarly disciplined. This

is a classic "dual motive" case in which the decision to discipline involves two factors – (1) a legitimate business reason and (2) the employee in question had engaged in union or other protected activities.

In the case of *Wright Line*, 251 NLRB 1083, 105 LRRM 1169 (1980), enforced 662 F.2d 899, 108 LRRM 2513 (1st Cir. 1981), *cert. denied*, 455 U.S. 989, 109 LRRM 2779 (1982), the National Labor Relations Board reformulated the allocation of the burden of proof in cases where an employer asserts a legitimate motive in disciplining or discharging an employee. The Board set forth the following test:

> . . . we shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivations. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established the burden will shift to the employer to demonstrate that the *same action would have taken place even in the absence of protected conduct*. 105 LRRM at 1174-1175. (emphasis added)

The Board's construction of the Act permits an employer to avoid being adjudicated a violator by showing that his actions would have been taken regardless of his prohibited motivation.

The Supreme Court of the United States approved and adopted the *Wright Line* analysis in *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469, 113 LRRM 2857 (1983). This Court analogized the allocation of the burden of proof to a method that it established and approved in a case implicating the Constitution in *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). In that case it held that the plaintiff had to show that the employer's disapproval of First Amendment protected

expression played a role in the employer's decision to discharge. If plaintiff carried the burden of persuasion, the burden would then be on the employer to show by a preponderance of the evidence that it would have reached the same decision even if, hypothetically, he had not been motivated by a desire to punish plaintiff for exercising First Amendment rights. The use of the *Wright Line* analysis in dual motive cases is not optional; it is *mandatory. NLRB v. Transportation Management Corp., supra.* The Tenth Circuit's failure to remand these proceedings to the National Labor Relations Board for application of the *Wright Line* and *Transportation Management* analysis conflicts with the highest court in the land and with decisions within the Tenth Circuit and in other circuits and the Board's own adopted test.

The Tenth Circuit's decision conflicts with a decision that it issued less than four months before. In *McLane/Western, Inc. v. NLRB*, 723 F.2d 1454, 115 LRRM 2112 (10th Cir. 1983), the Tenth Circuit refused to enforce the decision of the Board that the termination of an employee for eating one broken cracker which had fallen from a damaged case of crackers on the floor was an unfair labor practice in view of the employee's union activities. The employee's conduct violated a company rule against pilfering. The court considered it significant that, although the Board rendered its decision in *McLane/Western* on the same day as it issued its *Wright Line* decision, the Board refused to apply the *Wright Line* standard even after the company had filed a motion for reconsideration. The court stated:

> The ALJ and the Board, however, did not make any findings with regard to the question whether McFarland would have been discharged even if he had not engaged in protected conduct. 115 LRRM at 2117.

The court resisted the temptation to disregard precedent. It held that the findings could not preclude the possibility that the company could prevail on the defense if it would have terminated the employee even had he not engaged in protected activity. It concluded:

> . . . [W]e should not make any findings on the second phase of *Transportation Management Corp.* analysis in the first instance. The Board therefore should reconsider McFarland's discharge in light of *Transportation Management Corp.*, conducting further proceedings deemed necessary and entering new findings, conclusions and an appropriate order on the issue of McFarland's discharge. 115 LRRM at 2117-2118.

Reconciling the results in *McLane* and *IREA* is impossible. In *McLane* the Tenth Circuit ordered the proceedings remanded to the National Labor Relations Board where the employee's offense was eating a single cracker from a box of broken crackers. Yet in this case, it is unwilling to order the same where an employee left her assigned place of work and took an unauthorized leave of absence for a vacation. The ALJ, the Board, and the Tenth Circuit erred in focusing on IREA's attitude toward the union to the exclusion of the overwhelming evidence that Tate transgressed significant company policies.

The Administrative Law Judge based his decision on a finding of pretext and ended his analysis there, although the NLRB stated on three different occasions in *Wright Line* that the pretext analysis was no longer relevant under the *Mt. Healthy* dual motive test. See 105 LRRM, footnotes 4, 5 and 13. In this case the Board completely ignored *Wright Line* and the Tenth Circuit followed the same faulty analysis as the Administrative Law Judge. In effect, the ALJ and the Tenth Circuit said that once the General Counsel demonstrated that IREA had an anti-union motive, and it knew the employee to be

a Union activist (something IREA freely admitted since the employee trumpeted her Union activism), its analysis ended and that constituted a violation of the Act. That is precisely the improper result that *Wright Line* sought to avoid. It places the employee in a better position because of her protected activity, something that this Court rejected in *Mt. Healthy* when it stated that "The constitutional principle at stake is sufficiently vindicated if such an employee is placed in *no worse* a position than if he had not engaged in the conduct." 429 U.S. at 285-286. (emphasis added)

In this case IREA showed that Tate was refused her request for the week off, that the employer knew that she had previously been planning to take a vacation even though she had no available time off, and when she stated that she would take the time off regardless of permission she was warned that if she left she might be terminated, and the employer still waited three days into her absence before it effected the termination. Under any analysis, that constitutes "good cause" or "just cause" under Section 10(c) of the Act. Yet, the Board and the Tenth Circuit ignored that good cause but merely said that they had already decided that because IREA had an anti-union animus they would look no further. IREA showed that it would have terminated Tate even absent her protected activity; indeed it showed that it previously refused such requests for time off by an employee with more compelling reasons than Tate and with no Union ties and that employee resigned rather than take an unauthorized leave.

The Tenth Circuit simply concluded that IREA was "unlawfully motivated" (Footnote 8, p. 10) and the finding by the administrative law judge of anti-union animus on the part of Tate's superiors "ruled out" the possibility

of petitioner's prevailing on a *Wright Line* defense. 732 F.2d at 760. This decision conflicts with the Sixth Circuit's holding in *Lawson Company v. NLRB*, 753 F.2d 471 (6th Cir. 1985) that the *Wright Line* analysis must be used to evaluate cases alleging violations of Sec. 8(a)(3) or Sec. 8(a)(1) of the National Labor Relations Act which turn on employer motivation. In so doing, the Sixth Circuit rejected the Board's conclusion that the *prima facie* showing of anti-union animus in the case was so strong that the employer's defense could be rejected without analysis or reference to the *Wright Line* standards. 753 F.2d at 476. The Sixth Circuit, therefore, has rejected the very analysis endorsed by the Tenth Circuit in this case.

The Fourth Circuit has also rejected the analysis endorsed by the Tenth Circuit in this case. In "dual motive" cases, the Fourth Circuit has held that if an employee's conduct justifies his termination, the employer's anti-union animus "is not of controlling importance."

> The rule is that if the employee has behaved badly it won't help him to adhere to the Union, and his employer's anti-union animus is not of controlling importance.

Standard Products Company Rocky Mt. Division v. NLRB, 824 F.2d 291, 293 (4th Cir. 1987), quoting *Neptune Water Meter Company v. NLRB*, 551 F.2d 568, 570 (4th Cir. 1977). Indeed, the Fourth Circuit has held that the Board must articulate "an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one" in dual motive cases. *McLean Trucking Company v. NLRB*, 719 F.2d 1226, 1227-28 (4th Cir. 1987).

In *McLean Trucking Co. v. NLRB*, since there was evidence that a discharged employee had a poor work record, although he was also active in union affairs, the

Fourth Circuit denied enforcement and remanded the cause for further proceedings. It stated:

> It is the Board's task to weigh conflicting relevant evidence, to apply its expertise, and to assign reasons for this decision. Our task is to review a decision of the Board in light of what it did on the grounds it has asserted in support of its decision, not in the light of those things the Board might have done but did not do or those grounds the Board might have asserted but did not assert. [Citations omitted] We thus are not free to grant enforcement of the Board's order on the ground advanced by the dissenting opinion – that the Board reached a fair factual determination in the fact of competing evidence. That is so because the Board, in fact, never did weigh the competing evidence. Instead, it effectively excluded from consideration, for a reason shown to be incorrect, relevant evidence supportive of the employer's position that the discharge was prompted by a lawful motive. 114 LRRM at 2654.

In this case the Tenth Circuit did precisely what the Fourth Circuit corrected refused to do: it declared that the Board reached a fair factual determination when the Board never applied the proper analysis. The court cannot substitute its judgment for that of the Board where the Board is required by law to decide whether the action taken by the company would have occurred in the absence of conduct arguably protected by federal labor law. It is the duty of the Board in the first instance and not the reviewing court to determine the facts. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1958); *NLRB v. Duquesne Electric & Manufacturing Co.*, 518 F.2d 701 (3rd Cir. 1975). *See, SEC v. Chenery Corp.*, 317 U.S. 80 (1943). The Board failed and refused to fulfill its obligations by failing to inquire whether the employee would have been terminated absent protected activity.

The court's decision also conflicts with cases from Courts of Appeals upholding discharges of employees for unexcused absences and walking off the job. In *NLRB v. First National Bank of Pueblo*, 623 F.2d 686 (10th Cir. 1980), the evidence was uncontroverted that the terminated employee took an unauthorized day off. Like this case, the employer told the employee that she would be terminated for doing so. In denying the enforcement of the Board's order finding an unfair labor practice, the court stated that the National Labor Relations Act does not allow the NLRB to act as a "super employer" in derogation of the right of the employer to select its employees or discharge them. See also, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The one week unauthorized leave by Tate dwarfs the one day absence of the terminated employee in the *First National Bank* case. The Tenth Circuit's failure to apply the proper analysis in this case again creates an irreconcilable conflict between two of its own cases.

This case also conflicts with the Eighth Circuit's case of *Sioux Quality Packers v. NLRB*, 581 F.2d 153, 98 LRRM 3128 (8th Cir. 1978). In that case the terminated employee was discharged following an incident culminating in his leaving his work station in the face of a direct order to remain. In refusing to enforce the Board's finding of an unfair labor practice, the Eighth Circuit stated that a finding of discrimination by the Board must be supported by substantial evidence; it may not rest upon flimsy evidence, mere inference or guess work. *The Independent Gravel Company v. NLRB*, 566 F.2d 1090 (8th Cir. 1977). The court took issue with the Board's reasoning that because a prior discharge had been improper, subsequent discharges must have been similarly motivated.

The facts in this case are not significantly different from the *Sioux Packing* case. The court merely dismissed a legitimate business reason for suspension and termination as pretextual while the court's own decision cites substantial evidence that the actions taken were proper and in accordance with company rules. Given that IREA demonstrated at trial legitimate business reasons for termination and suspension, the Board was required to determine whether such action would have resulted absent protected activity. See *Wright Line, supra, NLRB v. Transportation Management Corp., supra.*

It was an error for the Tenth Circuit to excuse the Board's failure to apply a *Wright Line* analysis in this instance. Application of *Wright Line* to the facts in this case requires the exercise of the Board's administrative expertise in the first instance. The Tenth Circuit's failure to remand deprived IREA of the opportunity to have its defense considered by the Board. Absent that consideration, Tate receives a type of protection that was never intended. "The Act is not a 'shield for the incompetent' even though the incompetent seeks immunity under the mantle of Union membership or activity." *TRW, Inc. v. NLRB*, 654 F.2d 307, 312 (5th Cir. 1981) Indeed, under the Tenth Circuit's holding herein, Tate is completely insulated from any disciplinary action, no matter what the employer's justification.

Furthermore, the Tenth Circuit erred in then holding that petitioner could not possibly prevail in its *Wright Line* defense because of the weight of evidence showing anti-union animus on the part of Tate's superiors. The question of whether anti-union animus played a part in the decision to terminate Tate is but one prong of the test and is wholly independent of the question of whether there existed independent cause for termination. The

Tenth Circuit's holding to the contrary creates a split in the circuits and is erroneous.

The failure of the Tenth Circuit to remand for such Board analysis contradicts Board law, Tenth Circuit and other Circuit decisions since this Court's *Transportation Management Corp.* decision.

II. Precedent Exists For The Court To Vacate And Remand This Order Without Hearing The Case On Its Merits.

In four cases following the Supreme Court's decision in *NLRB v. Transportation Management*, 102 S.Ct. 2469, 113 LRRM 2857 (1981), which endorsed the NLRB's *Wright Line* test this court granted the petitions for writ of certiorari and remanded the cases for further consideration in light of the *Transportation Management* decision. These cases are *NLRB v. Heartland Food Warehouse*, 103 S.Ct. 3104, 113 LRRM 2952 (1983); *NLRB v. Blackstone Company*, 103 S.Ct. 3105, 113 LRRM 2952 (1983); *NLRB v. NYU Medical Center*, 104 S.Ct. 532, 114 LRRM 2567 (1983); and *NLRB v. United Parcel Service*, 104 S.Ct. 419, 114 LRRM 3168 (1983).

Clearly a case involving termination of an employee who took an unauthorized leave of absence, a good cause for dismissal, when such employee is a union supporter, falls within the dual motive test of *Wright Line*. The facts of this case demand an analysis in the first instance by the NLRB pursuant to its *Wright Line* test.

The Tenth Circuit's holding, that where the Board fails to apply the correct legal standard and fails to make a finding required by that standard, a reviewing court may "rule out" the possibility of a different result if the correct standards had been applied and findings made, is contrary to the long-standing position of this Court as well as holdings in other circuits. In *Securities and*

Exchange Commission v. Chenery Corp., 317 U.S. 80 (1943), this Court held that if an order is valid only as a determination of policy or judgment which an agency alone is authorized to make and which has not been made, "a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." 318 U.S. at 88. Here, as in *Chenery*, the actions of an administrative agency charged with applying and upholding an act of Congress "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding. (cite omitted) There is no such finding here." 318 U.S. at 94. The Board did not determine, as *Wright Line* requires, that IREA would have terminated Tate even absent her protected activity. The Tenth Circuit here did precisely what *Chenery* forbids when it "ruled out" any possibility that petitioner would prevail upon a correct application of the *Wright Line* defense available to it.

Although this Court has not questioned the continued vitality of *Chenery*, the Tenth Circuit's decision here amounts to an abandonment of that authority. Other circuits continue to adhere to the view that the application of the proper legal standards to important factual questions should be undertaken by the Board, not a reviewing court in the first instance and that the courts cannot supply an alternative rationale for a Board decision. *See, International Union, U.A.W. v. NLRB*, 802 F.2d 969, 975 (7th Cir. 1986); *NLRB v. Indianapolis Mack Sales and Service, Inc.*, 802 F.2d 280, 285 (7th Cir. 1986); *NLRB v. L & J*

Equipment Company, Inc., 745 F.2d 224, 231, and n.8, rehearing denied, 750 F.2d 25 (3rd Cir. 1984); *Fiber Glass Systems, Inc. v. NLRB*, 807 F.2d 461 (5th Cir. 1987); *John Cuneo, Inc. v. NLRB*, 792 F.2d 1181 (D.C. Cir. 1986).

Since neither the Board nor the Tenth Circuit applied the proper standard in this case, the court would be justified granting this Writ, vacating the Order of the Court of Appeals and remanding the case to the National Labor Relations Board.

III. The Court Of Appeals Decision On The Confidential Secretary Issue Conflicts With Decisions Of Other Circuit Courts, And The National Labor Relations Board.

Despite the overwhelming evidence of labor nexus, the Court of Appeals enforced the Board's order that Katherine Tate was not a confidential secretary. The Court's decision conflicts with decisions of other Circuits, as well as the NLRB. This Court's review is imperative to clarify the standard for confidential employee status.

The most pronounced conflict is with the recent decision of the Court of Appeals for the Fourth Circuit in *Prudential Insurance Company of America v. NLRB*, 832 F.2d 857 (4th Cir. 1987), in which the Fourth Circuit found the employee had confidential status. The labor nexus in this case is far stronger than in *Prudential*, and nearly every indicia of the exercise of managerial function in labor relations noted in the Tenth Circuit decision below in which it cited *Prudential* are present, and were even stronger for the Director of Engineering at IREA. The decisions cannot be reconciled.

IREA's Director of Engineering was responsible for daily supervisory operations of office personnel and all engineering personnel. He recommended hiring, firing

and disciplining all personnel subject to his supervision. He had responsibility for making recommendations as to promotions, increases and allowances. (NLRB Supplemental Decision and Order, p. 8) The manager in *Prudential* merely investigated grievances at level 1 and formulated and *recommended* a response to his superior. Deans was responsible for hearing and deciding level 3 grievances. The Labor Board, in its brief, admitted Deans had a role in grievance handling. Unlike the manager in *Prudential,* Deans had authority to resolve the grievance, and his response was required to be in writing. In addition to these responsibilities, which the Fourth Circuit found present in *Prudential,* and which supported its conclusion that the employee exercised managerial functions in the field of labor relations, Deans supplied information for use by IREA negotiating team before collective bargaining negotiations. He also attended management strategy meetings and reviewed contract language.

The Fourth Circuit also emphasized that the assistant's position was described as "confidential" by the company's personnel policy handbook. Likewise, Tate's job description was described as "confidential" in IREA's policy manual. It was uncontroverted that during her short term of employment, her responsibilities included preparing confidential minutes at meetings and recommendations regarding labor relations matters. Furthermore, Tate admitted she was informed she would have access to confidential information when she was hired. Moreover, the Board specifically found that she typed three memoranda for the Director of Engineering on the subject of labor or personnel matters. These memoranda included negotiating with the union, appropriate bargaining units, and a grievance matter. Her efforts were more actual performance of confidential secretarial work

directly connected with the labor relations policy and activities of the company than was present in the assistant's work in the *Prudential* case. The two cases cannot be reconciled.

The Court of Appeals' error was more than mere failure to distinguish facts. Of more consequence is the failure of the Board and the Court of Appeals to recognize the criterion for determining confidential status is not the actual *exercise of the responsibilities in a confidential capacity,* but rather it is sufficient that any employee may *on occasion* have access to certain labor related or personnel type information. *B.F. Goodrich,* 115 NLRB 102, 37 LRRM 1380 (1956). Employees who "regularly have access to confidential information concerning anticipated changes which may result from collective bargaining negotiations" are deemed confidential employees. *Raytheon Company,* 279 NLRB 35, 122 LRRM 1036 (1986).

Merely because collective bargaining had not commenced was not a reason to deny confidential status. The Board found employees to be confidential employees prior to the initiation of collective bargaining negotiations in *Associated Day Care Services of Metropolitan Boston,* 269 NLRB 32, 115 LRRM 1217 (1984). The Board found administrative assistants working directly for managerial employees with labor relations responsibilities were confidential employees, based on three responsibilities: 1) They were expected to play a role in the investigation of grievances that would affect management's decisions on merits of grievances; 2) They were expected to have regular access to, and on occasion, to type memoranda containing management proposals for collective bargaining; and 3) They regularly would see minutes of weekly management meetings at which management's bargaining proposals would be discussed. The Board's finding in

the *Associated Day Care Services* case is directly applicable to this case.

Finally, the Board and Court's decision creates a serious conflict with the Court of Appeals for the Sixth Circuit on the issue of how detailed the information the employer must present regarding the substance of labor relations issues to meet its burden on the confidential employee issue. This issue is a significant one, as the Tenth Circuit's decision will require employers to reveal information regarding the substance of collective bargaining that it would not otherwise be required to provide. The decision conflicts with *NLRB v. Allied Prod. Corp., Richard Bros. Div.*, 548 F.2d 644 (6th Cir. 1977). In that case, the Board's finding that a personal secretary did not have confidential status was apparently based on the inability of the secretary and her employer to recall, with two exceptions, any particular items which the secretary had typed or seen. Judge Wade McCree, for the Sixth Circuit, reversed, stating "Once an employer has demonstrated that a secretary prepares and reads labor relations materials, it need not provide a list of the particular documents that have flowed through the secretary's hands unless the charging party has at least introduced evidence which contests the general statement." 548 F.2d at 649. In this case, IREA presented evidence of the subject matter of memoranda, and the charging party did not contest the fact that Tate prepared labor relations materials and had access to them. In essence, the Board and the Court of Appeals have required employers to provide detailed evidence of labor relations matters during a time in which the employer is interested in the very confidentiality of this information. This Court has held in *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981), that confidential employees with a labor nexus are excluded from collective bargaining

units. These employees include those who "regularly have access to confidential information concerning anticipated changes which may result from collective bargaining negotiations." 454 U.S. at 189. The issues that are the subject of this proceeding are ones requiring clarification, and ones which are bound to arise on numerous occasions wherever collective bargaining agreements exist between employers and unions. The Tenth Circuit's decision conflicts with prevailing law, and must be reversed.

CONCLUSION

This case raises a number of serious issues for the Court. The failure of the Tenth Circuit to remand this case to the NLRB on the issue of whether IREA would have terminated this employee absent her union activities is a violation of a long-standing principle enunciated by this court in *Chenery*. That same failure shifts the balance in labor relations completely in favor of the employee who takes pains to publicize her union sympathies. It allows an employee to wrap herself in the mantle of unionism and throw down the gauntlet to her employer by walking off the job and taking a vacation when she was refused time off and still avoid any appropriate disciplinary action by her employer. The Tenth Circuit's holding of this case is inconsistent with *Wright Line, Transportation Management Corp.*, and misinterprets Sec. 10(c) of the NLRA, 29 U.S.C. § 160(c). The Tenth Circuit's upholding of the order of the Board that Tate was not a confidential employee conflicts with the decision of the Fourth Circuit in *Prudential Insurance Company;* the Sixth Circuit in *Allied Products Corp.;* and the Supreme Court decision in *Hendricks.*

The Petitioner, Intermountain Rural Electric Association, respectfully requests the Court to issue a Writ of

Certiorari to the Court of Appeals for the Tenth Circuit to review its decisions in this matter.

Respectfully submitted,

SEMPLE & JACKSON, P.C.

MARTIN SEMPLE
The Chancery, Suite 1300
1120 Lincoln Street
Denver, Colorado 80203
(303) 595-0941

Attorneys for Petitioner
Intermountain Rural Electric
Association

[APPENDIX A-1]

FJP

253 NLRB No.164

D–7203
Littleton, Castle Rock,
Conifer, Strasburg, and
Woodland Park, CO

UNITED STATES OF AMERICA

BEFORE THE NATIONAL
LABOR RELATIONS BOARD

INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL No. 111

Cases 27–CA–6151
27–CA–6280, and
27–CA–6305

DECISION AND ORDER

On September 29, 1980, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and

has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Intermountain Rural Electric Association, Littleton, Castle Rock, Conifer, Strasburg, and Woodland Park, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

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[1] The fact that we are ordering Respondent to reinstitute its pension plan as it existed as of December 31, 1978, although allegedly unqualified by reason of IRS Ruling 78–403, does not preclude the parties from bargaining over any proposed changes, including retroactive changes, intended to retain IRS qualification. Rather, our Order merely restores the *status quo ante* and places the parties in the positions they would have enjoyed but for Respondent's illegal conduct.

Respondent's motion to reopen the record shall be, and it hereby is, denied as irrelevant to the issues presented for our review. In addition to the reasons given by the Administrative Law Judge for finding Tate's discharge to violate Sec. 8(a)(3), we note that a principal reason for Respondent's denial of Tate's request for leave, namely, the backlog of work for her, was itself the product of Respondent's earlier unlawful suspension of her.

Dated, Washington, D.C. January 8, 1981

John H. Fanning, *Member*

Howard Jenkins, Jr., *Member*

John A. Penello, *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

(SEAL) **NOTICE TO EMPLOYEES** (SEAL)

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to bargain collectively with International Brotherhood of Electrical Workers, Local No. 111, as the representative of the employees in the appropriate unit described below, by abrogating article XVII of the 1977-80 bargaining agreement between us and the Union, as concerns the treatment of pension plan dividends, or by abrogating any other provision of said agreement, without the valid consent of the Union. The appropriate unit is:

> All production and maintenance employees employed by us at and out of our Littleton, Colorado, place of business, and at or out of our branch places of business, including Castle Rock, Conifer, Strasburg, and Woodland Park, Colorado, including the warehouseman, the janitor, the assistant engineers, and chain and rod man; excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT refuse to bargain collectively with the Union, as the representative of the employees in the above unit, by failing to provide the Union, promptly upon request, with complete information underlying our decision to alter the application of dividends under our pension plan; or with any other information to which the Union is lawfully entitled as bargaining representative.

WE WILL NOT discharge, suspend, reprimand, or otherwise discriminate against employees for engaging in union or concerted activities protected by the Act.

WE WILL NOT tell employees that "a blanket" has been put on raises "because of the filing" of a petition for

a union election; and that raises probably will not be forthcoming "if the Union comes in," but probably will be "if the Union doesn't come in."

WE WILL NOT ask employees why the employees "were filing for a union."

WE WILL NOT indicate to the employees, by memorandum or otherwise, that the Union's election victory and the organization effort preceding it were a futility and would cause them economic detriment.

WE WILL NOT tell employees, in response to their union sympathies and activities, that we are thinking of suspending them or that they will "probably be fired."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under the Act.

WE WILL rescind the change in the treatment of pension plan dividends, effective January 1, 1979, as it affects employees in the above unit; and execute whatever documents, make whatever remittances, and otherwise do whatever is necessary to restore the situation, as concerns employees in the above unit, to that which would now obtain had the change never been made.

WE WILL promptly provide the Union with all documents and information requested by it on May 31 and August 16, 1979, concerning the pension plan.

WE WILL, upon request, to the extent required by Section 8(d) of the Act, bargain collectively with the Union as the representative of our employees in the above unit, concerning contemplated changes in the terms or conditions of employment of those employees,

and, if an understanding is reached, embody it in a signed document.

WE WILL offer Katherine Tate immediate and full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges, discharging a replacement if necessary; and WE WILL make her whole for any loss of earnings or benefits suffered by reason of her unlawful suspension and discharge in July 1979, with interest on lost earnings.

WE WILL expunge from our files and other records all copies of or references to the reprimand, dated July 5, 1979, that was issued to Kathleen Gunton, and inform her in writing that this has been done.

INTERMOUNTAIN RURAL
ELECTRIC ASSOCIATION
(Employer)

Dated_____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice of compliance with its provisions may be directed to the Board's Office, U.S. Custom House, Rm. 260, 721 19th Street, Denver, Colorado 80202, Telephone 303-837-3551.

[APPENDIX A-2]

JD-(SF)-308-80
Littleton, Castle Rock,
Conifer, Strasburg, and
Woodland Park, Colorado

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL No. 111

Case Nos. 27–CA–6151
27–CA–6280
27–CA–6305

Daniel C. Ferguson, Esq., for the General Counsel.
Martin Semple, Esq., for the Respondent.
Philip Hornbein, Jr., Esq., for the Charging Party.

DECISION

RICHARD J. BOYCE, Administrative Law Judge

I. Statement of the Case

This matter was tried before me in Denver, Colorado, on November 14-16, 1979. The underlying charges were filed by International Brotherhood of Electrical Workers, Local No. 111 ("Union") on March 19, July 12, and August 7, 1979. A consolidated complaint, superseding separate complaints of earlier date, issued on October 18,

1979, alleging that Intermountain Rural Electric Association ("Respondent") had committed certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act ("Act").

II. Jurisdiction

Respondent is a Colorado corporation, with headquarters in Littleton, providing electrical power to the communities of Castle Rock, Conifer, Strasburg, and Woodland Park, as well as Littleton. Its annual gross income exceeds $250,000, and it annually supplies power of a value exceed $5,000 to firms in Colorado which meet the Board's direct inflow jurisdictional standard.

Respondent is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

III. Labor Organization

The Union is a labor organization within Section 2(5) of the Act.

IV. The Alleged Violations of Section 8(a)(5) and (1)

A. Allegations

The union represents the so-called outside or production and maintenance employees in a unit embracing Respondent's operations in the five communities named above.[1] The complaint alleges these violations of Section 8(a)(5) and (1) as concerns this unit:

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[1] The formal unit description is: "All production and maintenance employees employed by [Respondent] at and out

(Continued on following page)

(a) That, since April 18, 1979, Respondent has failed to make pension contribution for the employees as previously agreed upon with the Union, and has refused to negotiate the matter with the Union.

(b) That, since May 31, 1979, Respondent has failed to comply with the Union's request for assorted information concerning an employee pension plan and Respondent's decision to reallocate dividends from the plan.

B. Facts

Article XVII of the current bargaining agreement covering the employees in the unit just described, effective from December 1, 1977, through November 30, 1980, provides:

> The Association [Respondent] agrees to keep in full force and effect, during the term of this Agreement, the retirement plan, including the return of dividends and profits to the plan, . . . presently in effect covering employees of the Association. Where contribution is presently required by an employee, such contribution shall continue to be required.

At the time this agreement was entered into, Respondent was party to an annuity contract with Minnesota Mutual Life Insurance Company ("Minnesota Mutual")

(Continued from previous page)

of its Littleton, Colorado, place of business, and at or out of its branch places of business, including Castle Rock, Conifer, Strasburg, and Woodland Park, Colorado, including the warehouseman, the janitor, and assistant engineers, and chain and rod man; excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act." It is undisputed that this is an appropriate unit for purposes of the Act, and it is so found.

affording pension coverage for those employees, unit and non-unit alike, choosing to participate. Participating employees contributed between 3 and 5 percent of their compensation to the fund plan,[2] with Respondent contributing the remainder. Among the features of the annuity contract was a provision that yearly dividends in excess of $19,000 "shall be allocated to" the participating employees. Because of the above-quoted provision of the bargaining agreement, Respondent had bound itself to continue this arrangement, on behalf of the unit employees, for the term of that agreement.

Total dividends for 1978 were $72,000, meaning that, had the past practice been followed, the participants, unit and non-unit, would have received an allocation of $53,000 in January 1979. But this was not to be. In the summer of 1978, Respondent engaged the accounting firm of Peat, Marwick, Mitchell & Co. ("Peat, Marwick") to review the pension plan, the objective being to reduce its cost to Respondent. On November 21, 1978, representatives of Peat, Marwick and Minnesota Mutual met with Respondent's general manager, Stanley Lewandowski. They concluded that the plan as then constituted and funded eventually "would bankrupt the company," and further, that a substantial question existed whether the handling of dividends under the plan prevented its being a "defined benefit pension plan" qualifying for favored treatment under the Internal Revenue Code.

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[2] The participants contributed 3 percent of their first $350 in monthly income, and 5 percent of monthly income over $350.

This was followed by letters to Lewandowski, dated December 1, from Minnesota Mutual and Peat, Marwick. Both letters cited IRS Ruling 78-403, which issued on November 13, 1978. The Minnesota Mutual letter, characterizing the situation addressed by the ruling as "similar" to Respondent's, concluded: "[I]t is obvious from the ruling they [dividends] can no longer be allocated to the participants."Similarly, the Peat, Marwick letter construed the ruling to hold "that a defined benefit plan that credits excess investment income to individual participant accounts will not qualify." Noting that the ruling by its terms excused such plans already in existence, provided they were amended to conform "by the end of the first plan year that begins after December 31, 1978, and that the amendment is effective as of the first day of such plan year," the Peat, Marwick letter stated:

> It would appear necessary then, . . . to retain its qualified status, the Plan must be amended no later than December 31, 1979, to eliminate the crediting of dividends to participants with respect to dividends paid on or after January 1, 1979.

Lewandowski reported these developments at the monthly meeting of Respondent's board of directors, held December 5, adding that, since the existing plan as incorporated in the bargaining agreement provided for the allocation of excess dividends to the participants, any change in that regard "would have to be agreed to by the Union." Lewandowski's reported continued:

> Since we have two years remaining on the . . . current contract, the union would have to agree to open up the contract for renegotiation of that section.

Lewandowski stressed the need for "a strong selling point" to induce the Union to forego the dividend allocation, adding that it had been decided during his November 21 meeting with Minnesota Mutual and Peat, Marwick that, "if a plan was developed that eliminated the employee contribution . . . , that could be the salable feature."

The matter next was considered by the directors at a special meeting on December 18. Lewandowski again informed them that any change in the pension plan "would have to be negotiated with the Union," and proposed an alternative plan in which "dividends would be used to offset company costs and a salable feature to employees would be the elimination of employee contributions." During the meeting, the board authorized Lewandowski to "contact the Union and attempt to negotiate" such a plan. The IRS ruling notwithstanding, Lewandowski testified that his "entire objective" in seeking the board's authorization was "to reduce the company's costs and expenses for the pension plan."

Lewandowski and three other management officials[3] accordingly met with two union representatives, John Meaders and Robert Mason, on December 22. Citing IRS Ruling 78-403, Lewandowski announced that the allocation of dividends to participants would have to be discontinued, lest the pension plan lose IRS qualification, and, incorrectly, that the change had to be made by December 31, 1978. He granted that this would mean "a

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[3] Fred Williams, assistant general manager; Spencer Cronk, operations manager; and Roy Cowan, director of operations.

loss to" the employees, and said that he "contemplated" the elimination of employee contributions "to offset this loss." Lewandowski made no mention of his true objective–cutting costs–in seeking to change the plan. Meaders responded that he did not want the plan "to be disqualified"; that, "if the dividends were going to have to be applied in some other manner, there would have to be an offsetting arrangement made"; and that it would be only "fair" for Respondent "to pick up" the participants' share of the funding.

Lewandowski stated during the meeting that it might take "quite a while to work out the technical details" of the change and, indeed, that elimination of employee contributions might turn out to be impossible. Lewandowski offered that, in the meantime, Respondent either could cease withholding contribution shares from the participants' pay in the expectation that their further contributions would be unnecessary, assessing them later should that expectation not materialize; or it could continue to withhold, without remitting those moneys to Minnesota Mutual, later refunding such amounts, with interest, should further participant contributions not be needed. Meaders expressed a preference for the latter approach, on the ground that it would be easier to make refunds than to collect for several months of arrearages, and it was agreed to proceed in that fashion.

Meaders or Mason also said that any change in the plan would have to be reviewed by the Union's attorney and to be submitted to its membership for ratification; and Lewandowski stated that, were it to develop that participant contributions could not be eliminated, he

would "get back and talk with" the union representatives. Lewandowski conceded in his testimony that Meaders nor Mason verbalized any willingness by the Union to give up the allocation of dividends without some kind of offset.[4]

The relationship between Respondent and the Union to the time of the meeting just described was excellent. As Mason testified:

> [A]t that point in time, we had excellent relations to Mr. Lewandowski and we has absolutely no reason to doubt his word. His word has been good as gold for as long as we have known him. . . .

On December 29, Lewandowski met with the employees, describing the dividend/IRS situation much as he had to Meaders and Mason on the 22nd. Mason was present. Again, no mention was made of Lewandowski's more basic cost-cutting objective in seeking to change the plan. He stated that, while Respondent would continue to withhold contribution shares from the participants' pay, it was envisioned that their obligation would be assumed by Respondent and that the sums withheld would be

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[4] For the most part, the testimony of the several witnesses is in agreement regarding the substance of the December 22 meeting. Mason is credited that Meaders said any change would have to be reviewed by the Union's attorney and ratified by the membership. He was convincing on the point, even though the Union apparently did not follow this procedure on all mid-term changes in the contract, particularly since neither Lewandowski, Williams, nor Cronk denied that this was said, testifying only that they had no recall of it. Meaders and Cowan did not testify. Mason testified that Meaders was in Washington, D.C., at the time of trial, and thus unavailable to testify.

refunded upon perfection of the new arrangement. He also invited those not then participating to enroll, assuring them that, should it eventuate that participant contributions could not be eliminated, they would have the "option" of withdrawing.

On January 18, 1979, without further communication of moment between Respondent and the Union, Respondent's president and an official of Minnesota Mutual executed an amendment to the pension plan providing, as explained in a letter from Minnesota Mutual:

> [A]s of January 1, 1979, all dividends would be applied to reduce the employer's cost [and] the dividends which were allocated as of January 1, 1978, will be the last to be apportioned among the employees.

Also on January 18, Respondent's board of directors met, during which Lewandowski reported that he had instructed Minnesota Mutual not to file the amendment with IRS, "as we will be following up with a complete new plan." Lewandowski further reported that "there is no question . . . the elimination of employee contributions is what will be required in getting the plan changed," and that, regarding such contributions, "we are deducting the same from employees' checks but are not forwarding them to the insurance company." Lewandowski continued:

> We will keep the contributions as part of our general funds and general investments. If everything goes according to plan, then the contributions will be refunded to the employees with interest. For at least the first two months, the dividends should take care of the plan premiums. If it takes longer, we can make company contributions for premiums and not get

> into employee contributions until the entire matter is finalized. It is a lot simpler for us to keep track of the contributions rather than the insurance company. When a new plan would be finalized, there would be a premium adjustment one way or the other in switching from one plan to another.

The report closed: "We will work as rapidly as possible on the matter, but the language development and IRS approval will take time."

Lewandowski next reported to the directors on February 6, 1979, stating that the matter of the pension plan "is being worked on and some comparison data should be completed within 30 days."

By letter dated February 16–i.e., nearly a month after the event–Lewandowski informed the Union for the first time that the amendment to the plan had been executed by Respondent and Minnesota Mutual. The same letter stated that Respondent intended "to review the entire pension plan with the idea of making certain modifications, if possible, that would allow for the elimination of employee contributions," then noted, in seeming contradiction of Lewandowski's January 18 and February 6 reports to the directors, that he did not "anticipate any work or discussions on the subject the next few months."

A likely explanation for the assertion in Lewandowski's letter that he anticipated no further activity regarding the pension plan "for the next few months" is that the Union, on February 12, had petitioned the NLRB for an election among Respondent's "inside"

employees[5] – a development seemingly hardening his attitude toward the Union.[6] This explanation gains plausibility from Lewandowski's by then having received a letter, dated February 7, from Minnesota Mutual, setting forth in elaborate detail various calculations and projections that would obtain under a proposed new pension plan; from his soon receiving a similar letter, dated February 16, from Peat, Marwick; and from his reporting to the directors on March 6:

> Because of the organizing effort, this [the matter of the pension plan] will have to be indefinitely postponed. However, we are obtaining immediate benefits which are substantial, in that the dividends are coming back to the company and will be used to offset our cost. Since the Union got nothing in return, I am sure that they will bring up the matter in time, but it is doubtful that they will until the organizing matter is settled one way or the other.

Following Lewandowski's February 16 letter, the Union next heard from Respondent upon receiving this letter, dated April 18, from Lewandowski:

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[5] Case No. 27-RC-5809

[6] Thus, in a confidential memorandum to members of management, dated April 16, 1979, Lewandowski stated, with reference to the "organizing effort that has recently taken place," that Respondent "would not welcome the Union with open arms and . . . would deal [with it] in a cold, hard and arms[']length manner." The document continued that, should the organizing effort succeed, the office employees would be represented by the same union as those in "the existing bargaining unit," then repeated that "the relationship with [the Union] will be maintained on a cold, hard and arms[']length basis."

> This letter is in reference to my correspondence of February 16, 1979, concerning the Association's pension plan.
>
> As previously stated, our objective in reviewing the plan and considering modifications was to see if it was possible to eliminate the employees' contribution but yet provide the same level of benefits contained in the existing plan; continue about the same total amount of contributions that are presently being made on behalf of the employees and maintain approximately the same net cost to the Association. Our review of the plan shows that these objectives cannot be met and, therefore, we are doing nothing to modify the pension plan. Employees' contributions will continue as they have in the past. We are going to contact all of the employees who have joined the pension plan this past January 1 and notify them that contributions will continue and should somebody desire to drop out of the plan, they will be allowed to do so. This was stated at the meetings that were held when this subject was discussed. Of course, anybody who had belonged prior to January 1 will not be able to drop out of the plan.
>
> You have been previously notified that in accordance with Internal Revenue regulations, dividends are no longer being credited to employees but being used to offset the company's cost.

Also on April 18, Lewandowski disseminated this memorandum among the employees:

> You will recall that several months ago we had meetings concerning our pension plan. At the meetings, I had stated that we were going to be reviewing the plan with an objective of seeing if it was possible to eliminate the employees' contribution but yet provide the same level of benefits contained in the existing plan; continuing about the same total of contributions that are presently being made on behalf of employees and maintain approximately the same

> net cost to the Association. We have found that these objectives cannot be met and, therefore, the pension plan will not be modified and employees' contributions will continue as they have in the past. During the meeting you were notified that in accordance with Internal Revenue regulations, dividends are no longer being credited to employees but are being used to offset the company's cost.
>
> You will also recall that at the meeting, I stated that should the employee contributions not be eliminated then anybody who had joined effective January 1 would be given an opportunity to drop out of the pension plan. This memorandum is notification to you that should you desire to drop out of the plan, please let Tom Riffe know within the next 15 days. Of course, anybody who had belonged prior to January 1 will not be able to drop out of the plan.

In response to Lewandowski's April 18 letter, the Union promptly invoked the grievance procedure in the bargaining agreement. The gravamen of the grievance, as set forth in a letter of May 1 from Mason to Tom Riffe, Respondent's director of personnel, was Respondent's "altering the employee Retirement Plan which is referred to in Article XVII of the Agreement." Riffe's response, by letter dated May 10, was this:

> Several months ago, Mr. John Meaders and yourself were notified that Internal Revenue was coming out with a new regulation which eliminated the application of any dividends or profits back to a defined benefit plan. Subsequent to that time, on February 16, 1979, John Meaders was notified by letter that in accordance with Internal Revenue regulations, dividends would no longer be allocated to employee accounts. Should you have disagreed then, you should have filed a grievance at that time. The time period stipulation as noted in Article 21, Paragraph A of the Collective Bargaining Agreement requires

> that a request for a Step A proceeding be initiated within 5 days of the controversy. This was not accomplished, therefore, there is no grievance and there is no issue.

An arbitrator thereafter rejected Respondent's contention that the grievance was untimely, and an arbiter's decision on the merits of the dispute was pending at the time of the trial herein.

In his report to the directors at their meeting on May 8, 1979, Lewandowski stated:

> You will recall that we amended the [pension] plan in accordance with IRS regulation so dividends would be used to offset the Association's cost. . . .[W]e notified the Union that we would review the plan with the idea of seeing if it was possible to eliminate employee contributions and generally keep the same level of benefits. . . .I was not satisfied with the results of some studies. . . .A lot of it appeared not to really reduce our costs and some proposals were totally wrong and unacceptable. . . .Any further change would require union acceptance (there is even a good chance we will have to negotiate about the dividend that is now being used to offset our costs). Because of the circumstances, I notified the Union that we were using the dividend to offset our costs and were planning no additional change at this time. They had a fit and filed a grievance. They feel that the money is theirs and if it can't be put in the plan like previously, then it should be given back in some other manner. Without eliminating the employee contributions, the benefits are substantial to the company. The dividends for last year were over $72,000 and the end result is that our cost is being reduced by one-third. . . .
>
> There still is a need to review the plan further even if we need to make no concessions to the Union

> . . . .There are . . . a number of items that need to be explained and understood. . . .
>
> I plan to start gathering data this summer for comparisons and explanations. . . .Any further change would not be done until the next union negotiations, which would take place the last quarter of 1980.
>
> Regardless, in the meantime, our costs will be substantially less.

In a later report to the directors, on September 4, Lewandowski stated concerning the matter of the pension plan:

> [T]he Union has filed unfair labor practice charges regarding the pension plan. Regarding that matter, we have been processing a grievance and the Union has just demanded arbitration. It is the Union's contention that the company had no right to eliminate the dividend from the plan and just drop the matter. . . . IRS eliminated the plow back of dividends and because of cost considerations, we would not consider giving back that money to the employees in some other form.

Meanwhile, on May 31, Mason and the Union's attorney, Philip Hornbein, met with Respondent's attorney, Martin Semple, to discuss the Union's grievance over the pension plan. During that meeting, and again by letter dated August 16, Hornbein requested . . .

> . . . that the Company supply to the Union a copy of the group retirement annuity contract between the Company and Minnesota Mutual Life Insurance Company and copies of correspondence, memorandums, legal opinions, tax opinions, and other documents and papers relating to the Company's decision to divert to itself dividends and profits of the Retirement Plan.

Semple replied to the May 31 request that he would see what he could do, after which, under cover of a letter dated July 20, he provided a copy of the pension plan as then constituted, together with a booklet summarizing the plan. Then, under cover of a letter dated October 31, Semple supplied a copy of the contract between Respondent and Minnesota Mutual. Semple's cover letter included this:

> I apologize for the delay in getting this material to you. Since I have not reviewed the file in this matter for some time, I overlooked the fact that I had not responded to your last request.

Respondent previously had furnished the Union with a copy of IRS Ruling 78-403, in response to a request made at the December 22 meeting. Otherwise, the Union received nothing in response to its requests.

Lewandowski testified other documents were not provided because some in his view were privileged communications with counsel, and some contained information about non-unit employees, which he considered confidential, Lewandowski's testimony continued:

> I felt that that information was not information that should be given to the Union and would give them an advantage in negotiations that possibly they shouldn't have. . . . I'm not going to give the other side everything about the pension, the inside and outside, and the strategy in trying to negotiate a plan.

C. Conclusions

The dividend matter. Section 8(d) of the Act states:

> [W]here there is in effect a collective-bargaining contract . . . , the duty to bargain collectively shall also

> mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification– . . . (4) continues in full force and effect . . . all the terms and conditions of the existing contract . . . until the expiration date of such contract. . . .

Section 8(d) further states that the duty to bargain "shall not be construed as requiring either party to discuss or agree to any modification" of the terms and conditions of an unexpired contract, absent a provision for reopening.

The Union thus would have been within its right in holding Respondent to the letter of Article XVII of the bargaining agreement throughout the term of the agreement; and, so doing, to require the continued allocation of dividends to those unit employees participating in the pension plan. A determination that the Union relinquish that right must be grounded on "clear and unmistakable" evidence, for the "waiver of a statutory right will not be lightly inferred." *C & C Plywood Corporation,* 148 NLRB 414, 416 (1964).

Respondent contends that the Union consented to the abrogation of Article XVII during the meeting of December 22, 1978, between Lewandowski and the two union officials, Meaders and Mason. That the Union then and thereafter was willing to forgo the dividend allocation, to ensure the pension plan's continued IRS qualification, is clear. It is equally clear, however, that this willingness was contingent open a *quid quo pro* in the form of Respondent's taking over the contribution-shares of the unit-participants; or, should that turn out to be unfeasible,

upon its negotiating some other comparable concession.[7] This contingency perhaps was most graphically revealed by Lewandowski in his report to the directors on January 18, 1978, the very day the amendment to the annuity contract was executed, that there was "no question that- . . . the elimination of employee contributions is what will be required in getting the plan changed."

It is clear, finally, that whatever sincerity Lewandowski had regarding a *quid quo pro* ceased to exist about the time the Union petitioned for an election among the inside employees on February 12, 1979. Thus, he cryptically informed the Union on February 16 that he did not "anticipate any work or discussions on the subject for the new few months"; he reported to the directors on March 6 that the matter would "have to be indefinitely postponed . . . because of the organizing effort", he advised the Union on April 18 that Respondent was "doing nothing to modify the pension plan" and that employee contributions "will continue as they have in the past"; and he reported to the directors on September 4 that, "because of cost considerations, we would not consider giving back that money to the employees in some other form."

It is concluded in these circumstances that the Union's consent to the abrogation of Article XVII, as concerns the dividend allocation, was misleadingly

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[7] Contrary to the complaint, the weight of evidence compels the conclusion that Respondent did not enter into an enforceable agreement to assume the participants' pension contributions as a *quid quo pro*, but rather that it held this out as a strong likelihood, and that some other concession would be made should that not be feasible.

induced and perpetuated, and therefore of no jural effect. As stated in *Mor Paskesz*, 177 NLRB 166, 119 (1968), "a consent given upon unfulfilled conditions is no consent." Respondent's conduct in this regard consequently failed to comport with the Section 8(d) requirement that is continue "in full force and effect . . . all the terms and conditions of the existing contract"; and, so failing, violated Section 8(a)(5) and (1).[8]

The withholding of information. The Union's request for information made May 31, 1979, was ignored for nearly two months, and then complied with in only token fashion. Its iteration of that request on August 16 languished for about two and one-half months before being observed, as previously, in only small part.

It is concluded, without need for analysis or case citation, that Respondent's failure to comply fully and promptly with the Union's May 31 and August 16 requests was unwarranted, therefore violating Section 8(a)(5) and (1) as alleged.[9]

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[8] While the complaint is not couched in terms of the abrogation of Article XVII, the issue was sufficiently litigated to warrant the finding of a violation. *Niagara Falls Memorial Medical Center, Inc.*, 236 NLRB 342, fn. 2 (1978). Rejected is Respondent's contention that *Citizens National Bank of Willmar*, 245 NLRB No. 47 (1979), is "particularly apropos." That case did not involve the brogation of an existing contract provision. Again referring to Section 8(d), the duty to bargain does not require either party "to discuss or agree to any modification" of the terms and conditions of an unexpired contract.

[9] Lewandowski's professed opinion to the contrary, Respondent failed to make a showing that any of the requested material came within the attorney-client privilege. It is no defense, moreover, that some of the information sought pertained to non-unit people. E.G., *Rockwell-Standard Corporation*, 166 NLRB 124, 132 (1967).

V. The Other Alleged Violations

A. Background

In early 1979, a drive was undertaken to organize the so-called inside or office employees of Respondent in the five communities previously named. On February 12, 1979, as earlier mentioned, the Union filed for an NLRB election seeking certification as the representative of those employees. A post-filing hearing was held on March 2, after which the acting Regional Director issued a Decision and Direction of Election on March 21. The election followed on April 13; and, on August 31, after resolution of challenges to the eligibility of certain voters, the Union was certified as bargaining agent.

The conduct hereafter in issue took place at Respondent's headquarters in Littleton.

B. Alleged Misconduct by Spencer Cronk

Allegation. The complaint alleges that Cronk, Respondent's operations manager, violated Section 8(a)(1) on March 9, 1979, by telling an employee that "a blanket" had been placed on raises because of the pendency of the election, by asking the employee what had caused the employees to want a union, and by saying to the employee that she would not get a raise if the union got in, but might if it did not.

Facts. On March 9, Barbara Hightower, a consumer accounting representative for Respondent, questioned Cronk why she had not received a raise after 90 days on the payroll as Katherine Tate had. Hightower, who had

engaged in some union activities, speculated that that may have been the reason. She raised the matter with Cronk because Lewandowski previously had told the employees to take any union-related problems to Cronk.

Cronk replied that he would inquire about the status of Hightower's raise and "get back to" her. Later the same day, Cronk reported to her that the raise was not forthcoming, explaining in part that Lewandowski "had put a blanket on all raises . . . because of the filing" – a tacit reference to the pending election matter.[10]

Hightower asked what effect the union situation would have on her raise prospects. Cronk answered that, "if the Union comes in, you won't get your raise probably," adding: "(I)f the Union doesn't come in, then you will probably get your raise."[11] During the same conversation, which lasted well over an hour and embraced a

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[10] Hightower is credited that Cronk spoke substantially as set forth. Cronk conceded as much, testifying that he "may have used the term 'a blanket freeze,' or something like that, due to the fact that it [granting raises] was illegal or improper- . . . while the election was in process"; and that he "may have" mentioned Lewandowski "in this regard."

[11] This is Hightower's credited version of Cronk's remarks. Cronk testified that he said Hightower "would be considered for a raise after this matter was resolved," should the union be "voted out," which corresponds in substance with Hightower's testimony; but further testified that he said "any future raises would depend on the negotiations," should the Union get in, which differs significantly from the Hightower rendition. Cronk's professed conditioning of raises on the outcome of negotiations, if the union were to prevail, came across as an after-the-fact refinement of his comments to Hightower, and is not believed.

considerable range of subjects, not all union related, Cronk asked why the employees "were filing for a union." Hightower answered that she could speak only for herself, and that she was interested in "job security, promotions, [and] raises."[12]

Cronk admittedly "could have" remarked to Hightower, in this conversation, that Lewandowski thought it a "slap in the face" for the employees to seek union representation after all he had done for them.

Conclusions. It is concluded that Respondent violated Section 8(a)(1) substantially as alleged by Cronk's telling Hightower that Lewandowski "had put a blanket on all raises . . . because of the filing" of the election petition;[13] by his saying to her that she "probably" would not get a raise "if the Union comes in," but that she "probably" would "if the Union doesn't come in";[14] and by his asking her why the employees "were filing for a union."[15]

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[12] Hightower is credited that Cronk asked this question. Cronk, while testifying that he "knew better than to ask her any direct questions," admitted that he "may have" achieved the same effect with Hightower and others by saying that he was "unaware of what the problems had been as far as the inside employees were concerned as to why they desired to . . . have the Union represent them." That Cronk would conduct himself in so subtle and circular a fashion in eliciting information from the employees did not carry conviction.

[13] E.g., *Truss-Span Company*, 236 NLRB 50, 51 (1978).

[14] E.g., *Hinky Dinky Super Markets, Inc.*, 247 NLRB No. 169, slip op. (JD) 6-9 (1980). See generally, *Patsy-Bee, Inc.*, 249-NLRB No. 125, slip op. 6-7 (1980).

[15] E.g., *Didde-Glaser, Inc.*, 233 NLRB 765 (1977).

C. The Lewandowski Memoranda

Allegation. The complaint alleges that Lewandowski issued memoranda on June 27 and July 20, 1979, which violated Section 8(a)(1) by threatening delays in granting or the withholding of raises to discourage employee exercise of Section 7 rights, and further threatening to obstruct the employees in their exercise of those rights.

Facts. As earlier stated, the election among the inside employees was held on April 13, 1979. On June 26, the acting Regional Director issued a supplemental decision on challenged ballots; and, on June 27, Lewandowski circulated this document among Respondent's 20 or so supervisors:

MEMORANDUM

June 27, 1979

TO: All Supervisors
FROM: Stanley R. Lewandowski, Jr.,
SUBJECT: General Mgr.
Challenges for the Union Election

A decision has been issued by the District Director of the NLRB in Denver. The decision states that the position of Secretary to the Director of Personnel and Director of Member Relations and Energy Conservation is excluded; the Energy Conservation Specialist is excluded; the Secretary to the Director of Electrical Engineering is included, Plant Accountant is included and the Computer Programmer-Operator is included.

Since this decision is not acceptable to the Association, the matter will be appealed to Washington. Our appeal must be submitted by July 9. Martin Semple

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Since this decision is not acceptable to the Association, the matter will be appealed to Washington. Our appeal must be submitted by July 9. Martin Semple

> will be at the Association next Monday taking depositions of people supporting our position. This will delay the final outcome substantially. The initial estimate for this portion was that should an appeal be sent to the NLRB, a decision from them should be arrived at within about three months. However, it takes forever for the NLRB to do anything. The local director must file a brief and we know that there are substantial delays on getting anything out of the Denver office. I don't know how the Washington office is currently operating but it very well could be six months before any decision is arrived at. You will recall in a previous memorandum that should an unacceptable decision be arrived at in Washington, we have a right to proceed to the Tenth Circuit Court of Appeals and that again could take an additional three years. After next Monday, it should be a substantial period of time before we hear anything additional on the matter. I will keep you informed. Please pass this information on to your employees.

Lewandowski testified that he prepared this memorandum to provide the supervisors with answers to recurrent questions they were being asked by the employees. Copies of the document itself came into the possession of at least two unit employees.

On July 20, Lewandowski promulgated this memorandum to the supervisors:

MEMORANDUM

July 20, 1979

TO: All Supervisors
FORM: General Manager
SUBJECT: Labor Relations

There have been a couple of events that have transpired that I thought I would let you know about. The first is that the NLRB has postponed the hearing on unfair labor practice charges that was to be held July 24 to November 14. The NLRB attempted to get the matter resolved without the hearing, however, we refused. They then immediately came in stating that they desired to postpone the hearing. In checking into this, there are a couple of circumstances. One, it is very likely that Barbara Hightower may not be available or they cannot locate her for the case. Second, we have an indication that the judge from San Francisco thought that there was no merit in the case, however, the local district felt that they were not in a position to withdraw the charges. It is possible that we will never go to hearing on this matter.

The second item is the union has filed their statement in opposition to request for review of challenged ballots to the NLRB in Washington. Apparently, the union is becoming frustrated as it is affecting the language in some of the work they are putting out. The following is exact language as it appears in their statement. (1) "The request is palpably frivolous. It appears to us that the primary purpose of the request is to serve as an outlet for the employer's venom and irrational hostility against the regional director, rather than as a serious petition to the board." (7) "The employer's entire course of conduct in this matter has been one of obstruction, to frustrate the process of the board and to deprive the company's employees of an opportunity to bargain through a representative of their own choosing.

> I assume they will become very frustrated if the matter goes the entire three years before the Tenth Circuit Court of Appeals. I have been informed by Martin Semple that it is very possible that legally we probably should not change any salaries because of the pending matter during the entire three year period of time. I have not made a firm decision yet, but I am leaning toward the possibility that I will let the matter ride the entire three year period of time.
>
> I also wanted to mention that we will be having a comprehensive in-house, two-day seminar on the entire gamut of labor relations i.e., negotiating and renegotiating contracts, maintaining and recapturing management rights and the entire process of decertification. In this connection, I have retained the law firm of Jackson, Lewis, Schnitzler & Krupman. This firm is composed of 50 attorneys with headquarters in New York and branch offices in Atlanta and Los Angeles who do nothing but labor relations work.

Lewandowski testified that this document was issued "to keep the supervisors abreast of what was going on," but that, unlike the one of June 27, he "did not anticipate" that it would be distributed to, or that the supervisors would discuss its contents with, the employees. Even so, it purposely was given to Dorothy Pearce, previously determined by the acting Regional Director to be in the bargaining unit; and apparently, like the earlier one, got into the hands of other unit employees as well. Because of this latter development, according to Lewandowski, Respondent initiated the practice, as concerns later memoranda not meant for rank-and-file consumption, of making them "confidential." As he put it, "You live and learn." The record, however, contains an April 1979 memorandum so labeled, betraying the existence of the practice before July 20 and arguably suggesting that

Respondent contemplated dissemination of the contents of the July 20 document among those in the unit.

Conclusions. The June 26 memorandum, on its face meant for employee consumption, stated that a Board decision on Respondent's forthcoming appeal of the supplemental decision could "very well" take six months, and that an appeal of an "unacceptable" Board decision to the Tenth Circuit "could take an additional three years."

The July 20 memorandum, while not facially intended for the employees, in fact did reach some of them – a foreseeable development inasmuch as it carried no proscription against such dissemination and was similar in tenor to that of June 26. It again raised the prospect of a 3-year delay, occasioned by the appeal of an adverse Board decision to the Tenth Circuit, to which it added that salaries – and, by implication, wages – likely would be held constant for that "entire three year period of time." It reported, as well, that Respondent had retained a national law firm, specializing in labor relations, to conduct a "comprehensive" seminar covering "the entire gamut of labor relations," including "the entire process of decertification."

The message inherent in the two memoranda was that Respondent was intent upon forestalling the effect of the election for several years through the appeal process, meanwhile depriving the employees of any salary/wage progression, and then subverting the election outcome, if necessary, by resort to the decertification procedure. It is concluded that, by thus indicating to the employees that the Union's election victory, and the organizational effort

that precede it, not only were a futility, but would cause economic detriment, Respondent violated Section 8(a)(1) substantially as alleged. *Two Guys Discount Department Stores, Inc.*, 242 NLRB No. 161, slip op. (JD) 22 (1979); *Kent Brothers Transportation Co.*, 188 NLRB 53, 59 (1971); *L. F. Strassheim Co.*, 173 NLRB 846, 848 (1968).

D. The Reprimand of Kathleen Gunton

Allegation. The complaint alleges that Steve Glaim, Respondent's manager of office services, violated Section 8(a)(1) on July 5, 1979, by issuing a written reprimand to Gunton because of her exercise of Section 7 rights.

Facts. On July 3, 1979, an angry customer deposited a bag of spoiled food in the reception area of Respondent's headquarters building in Littleton, contending that a failure by Respondent to supply power had created the problem. In the aftermath, as is more fully developed later, Katherine Tate had an exchange with Cronk which irritated him. Mike Deans, Respondent's director of electrical engineering, consequently directed Tate to see him after work that day, leaving the impression while doing so that she might be suspended. Tate was Deans' secretary. Tate thereupon informed Gunton of the situation, and asked that she be present as a witness when Tate met with Deans. Gunton was a work order clerk in the accounting department.

At quitting time, Gunton went to Tate's work area, outside Deans' office. Also there, in addition to Tate, were Susie Deikman and Myrna Schmidt. Deikman's regular work station was in the front lobby, as a PBX operator. Schmidt, a secretary to management, regularly

worked near Tate. Several minutes after Gunton's arrival, Deans summoned Tate into his office, consenting to let Deikman have a final word with her first. Deikman and Schmidt then left, leaving Gunton behind. Gunton remained outside Deans' open door, maintaining visual contact with Tate and overhearing what was said.

Upon hearing Deans state that Tate probably would be suspended, but that he could not be certain because he could not get in touch with Cronk, Gunton asked Tate if she wanted a witness. Tate nodding in the affirmative, Gunton entered the room and asked Deans if there was not some way he could speak with Cronk so that Tate's status would be clarified before the July 4 holiday. Deans answered that he could not reach Cronk, and Gunton asked if he might be reached on his car radio. With that, Deans commanded Gunton to "get the hell out." As Gunton started to say something else, Deans stood up and repeated, "Get out!" Gunton then left.

On July 6, Glaim presented Gunton with this:

July 5, 1979

TO: Kathy Gunton
FROM: Steve Glaim
SUBJECT: Incident in Mike Dean's Office on July 3, 1979

I have been informed that at approximately 5:00 p.m., on July 3, 1979, you entered Mike Dean's office without any prior authorization and with no official duties to perform on behalf of IREA. Mr. Deans was most upset with you presence in his office at that time and felt that your conduct was inappropriate.

Please be aware of the fact that employees of Intermountain Rural Electric Association are not authorized to visit other areas of the office building after working hours unless they have authorization or official business to conduct. This is necessary for the efficient running and the good order of the organization.

This correspondence is intended as a reprimand for you inappropriate conduct on July 3, 1979. A copy of this correspondence will be placed in your permanent personnel file.

_____ _____

Name Date

I acknowledge that I received a copy of this correspondence and read its contents.

Gunton responded that she wished to tell her side of the story. Glaim said that she should put it in writing; that it would be placed, with his memorandum, in her personnel file. Gunton promptly submitted this document, which was put in her file:

July 6, 1979

TO: Steve A. Glaim
FROM: Kathy Gunton
SUBJECT: Written Reprimand

First of all I would like to state that I was in Kathy Tate's office not Mr. Deans' at 5:05 p.m., on July 3, 1979, waiting for Kathy to go home. She had asked me to wait and if Mr. Deans was intending to fire her to be her witness. Since I have done this on occasion for Dorothy Pearce I felt that Kathy had the same right. Also, since she was waiting after 5:00 p.m., her own time and my own time, without being paid for doing this I did not feel that I was going against the Association's policy.

> Second, I would like to state that I was in Mr. Deans' office at 5:20 p.m. on Kathy's authorization as her witness as to what was being said after company hours. All the time Mr. Deans was talking to Kathy previously I was in her office and as Mr. Deans left his door open the whole time where I could hear anything said Kathy did not feel it was against her right to have a witness.
>
> I would also like to add that as soon as Mr. Deans asked me to leave I did so promptly.
>
> I do not concur with the statements made in regards to the written reprimand I received dated July 5, 1979.

Glaim testified that Fred Williams, Respondent's assistant general manager, told him on July 5 that Gunton had entered Deans' office "uninvited and unannounced and more or less butted into the counseling that was taking place" between Deans and Tate; that he, Glaim, saw this as "an inexcusable act"; and that he therefore "drafted up" the reprimand letter. Glaim added that Gunton "had no business to be in the office building, let alone in another department area," after hours. Glaim asserted that he told Lewandowski of the incident before drafting the letter; and that Lewandowski, although making no recommendation, agreed that Gunton's conduct had been "inexcusable." Glaim testified that he issues reprimands without consulting Lewandowski "if they're of a minor nature," but that he regarded Gunton's actions to be misconduct of "a major nature" because "she was infringing on another department and a supervisor."

The employees in the accounting department had been told on April 24, 1979, that they were not to be at their desks before 7:55 a.m. and that they "had to be out"

not later than 5:05 p.m. The stated rationale for this, according to Gunton's credible testimony, was to avoid uninvited liability for overtime pay. And, on May 17, the accounting department employees were instructed that they were not to leave their work area without clearance from Suzy Holman, a supervisor in the department. The record affords no substantial basis for inferring, however, that this structure contemplated employee movement after hours.

Lewandowski conceded that Gunton's was the only written reprimand between January 1978 and the trial "for unauthorized visits to other areas of the building after working hours." There is no evidence, for that matter, that any such reprimands ever had issued before Gunton's. Neither Deikman nor Schmidt received adverse comment out of the incident in question, at least so far as the record shows; indeed, Deikman credibly testified that she commonly remained in the building after hours without any problem.

Gunton perhaps was the foremost union proponent among Respondent's employees. She provided the impetus for the first organizational meeting, contacting the union steward for the "outside" employees, Gordon Novacek, who conveyed her interest to a union official. She "set up" most of the ensuing organizational meetings, and typed letters informing the employees of them. She also gathered all of the authorization cards, after they had been signed, submitting them to the Union; and was a union observer during the election. Respondent concedes in its brief that Gunton's "strong" union proponency was "common knowledge."

Conclusions. It is concluded that Gunton, by entering Deans' office on Tate's behalf and proposing that an attempt be made to reach Cronk by car radio for clarification of Tate's job status, had joined with Tate "for the purpose of . . . mutual aid or protection", that her so doing therefore was protected by Section 7 of the Act; and that the ensuing reprimand consequently violated Section 8(a)(1) as alleged. *Park General Clinic,* 218 NLRB 540, 546-47 (1975). Cf., *Montgomery Hospital,* 233 NLRB 752, 754-55 (1977).

It does not detract from this conclusion that Gunton did not have a personal job stake in the outcome of the meeting between Deans and Tate. Quoting from *N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Company,* 130 F.2d 503, 505-06 (2d Cir. 1942):

> When . . . other workmen in a shop make common cause with a fellow workman over his separate grievance, . . . they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is the "mutual aid" in the literal sense. . . . [16]

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[16] Respondent's efforts to prove the existence of a prohibition, quoting from Gunton's reprimand, against "visit[ing] other areas of the office building after working hours," unless authorized or on official business, were unconvincing. *Emerson Electric Co.,* 185 NLRB 346 (1970), thus is distinguishable, in that those invited by the aggrieved employee in that case to act as witnesses left their work stations contrary to a "well-established rule" against so doing without consent. And, unlike Gunton, they were insubordinate in the face of a subsequent order to return to their stations.

that, if Tate were to put it on his desk, "we will find out who takes who where." Tate countered that she did not "sit with trash," and Cronk remarked, "Go ahead and have a wildcat walkout." Tate thereupon gathered her things, arose, and started walking as if to leave the area. Before she had gone far, however, a call came into the switchboard. She returned to handle it, and finished out her allotted time there.

Tate testified that she was "just goofing around" when she left the switchboard. Whether or not that was Cronk's immediate perception, he said nothing at the time. He testified that, "after a few minutes of contemplation," however, he "realized that that was an inappropriate action for Miss Tate to take"; and that, becoming "somewhat upset," he reported it to Deans.

Upon Tate's return to her desk as Deans' secretary, Deans said he had some "pretty heavy stuff to lay on" her. He then asked what had happened "down at the switchboard." After listening to Tate's recital, Deans commented that he had been thinking of suspending her, but now that he had "learned the gist of" the matter, he felt he should talk to Cronk again, and would "get ahold of" Tate later.

Deans next spoke with Tate shortly after 5 that afternoon.[18] He said that he had been unable to reach Cronk; that he, Deans, was about to go on vacation; and that he feared that "they" would not withhold suspending Tate

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[18] This is the encounter giving rise to the reprimand of Kathleen Gunton, discussed previously.

until his return. Deans' representation notwithstanding, he apparently had talked to Cronk. Cronk testified that Deans reached him on his car radio about 5, asking if he had told Tate to have a walkout; and that he replied that he could not remember.

Two days later, July 5, Cronk presented Tate with this:

July 5, 1979

TO: Kathy Tate
FROM: Spencer Cronk
SUBJECT: Incident at Switchboard on Tuesday, July 3

On Tuesday, July 3, 1979, at approximately 4:00 p.m., you were working as switchboard operator. You engaged me in a conversation relating to spoiled meat which was left by a consumer with whom I had been engaged in conversation. In the course of this conversation you made remarks and suggestions which I regard as acts of insubordination and disrespect for your supervisor and administrator of IREA. Such disrespect and insubordination cannot be tolerated of any employees of Intermountain.

You conduct on July 3, 1979, was unbecoming for an employee and is regarded by me as a most serious breach of the standard that is expected of our employees. Such conduct cannot and will not be tolerated by Intermountain.

Accordingly, I am suspending you without pay for a period of 3 working days commencing at 12:45 p.m., as a disciplinary action resulting from your disrespectful and insubordinate conduct. Since your regular supervisor in your capacity as secretary is on vacation, I will immediately communicate this action to him upon his return.

This correspondence will be placed in your permanent file. I request that you sign this letter indicating that you have received a copy and are aware of its contents.

_____ _____

Name Date

I hereby acknowledge that I received a copy of this correspondence and read its contents.

Tate wrote on the bottom: "I do not concur with the above statements."

On July 9, the last day of her suspension, Tate was given a note by her doctor, for tender to Respondent, "strongly" recommending that she be given a one-week leave of absence "because of health problems." The note, which did not specify the nature of the problems, closed: "Please don't underestimate the importance of this."

Returning to work July 10, Tate showed the note to Deans and announced that she was going to take a leave of absence as prescribed. Deans took the matter up with Fred Williams, his immediate superior, who referred him to Lewandowski. Lewandowski telephoned the originating clinic, verifying the note's authenticity, but made no effort to speak with the doctor or otherwise ascertain the nature or seriousness of Tate's condition. He and Deans assertedly then discussed whether the note gave rise to "a real need for" a leave of absence. According to Lewandowski, Deans said that "a substantial amount of work" had accrued during Tate's suspension, and that he consequently could not spare her. Lewandowski testified that Deans also mentioned that Tate had wanted to take a trip and had no vacation entitlement, the implication being that health was not the true reason for her request.

Lewandowski continued that he thought the form of the note to be strange if there was a genuine health problem – "Why did he [the doctor] not just give her a note excusing her from work [instead of] requesting leave?" Lewandowski concluded at length that Tate's request should be denied.

When Deans informed Tate of this, she declared that she had to follow her doctor's orders, regardless. Deans replied that she would "probably be fired" if she did, and Tate asked if that meant she was fired as of then. Deans answered that it did not, but that she "will probably be fired" should she fail to show up for work. Tate brought the exchange to a close by stating that she would be back in a week and then leaving.

Deans and Lewandowski thereupon collaborated in the preparation of this memorandum:

MEMORANDUM

July 10, 1979

TO: Tom Riffe, Director of Personnel & Training
FROM: Mike Deans, Director of Electrical Eng.
SUBJECT: Kathy Tate

On the afternoon of Tuesday, July 10, Kathy Tate requested a one week's leave of absence based on a note apparently handwritten by a doctor. The leave of absence was not granted for three reasons:

1. It is not only this department's but generally the company's policy that leave of absence will not be granted unless such leave would not interfere with the efficient operation of the company.

2. It was necessary to give Mrs. Tate a 3-day suspension which expired this afternoon because of a serious infraction. The workload caused because of that absence and the general work schedule precluded any granting of leave. It is essential that Kathy Tate's position be filled.

3. The note from the physician did not state that Kathy Tate was unable to work for medical reasons. It only stated that it was suggested that she be given a leave of absence. From this, I gathered that a pressing medical emergency did not exist but merely a suggestion that she might need some time off.

Upon being notified that the leave was not granted, Mrs. Tate indicated that she was obeying her doctor and leaving anyway. She left the office only to return a short time late stating that she would be back at work next Wednesday, July 18. I indicated to Mrs. Tate that she was not authorized to leave and should she be absent without authorization she would be terminated. She asked if she was terminated at the present time. I indicated that was not the case but it would be if she was not back to work.

It is my intention to allow Mrs. Tate time to reconsider her actions and return and fill her position. However, if she does not do that within the next day or two, then I have no choice but to effect her termination. In the meantime, I would like to have a Kelly Girl as soon as possible, preferably starting tomorrow at 8:00 a.m.

I considered that Mrs. Tate disobeyed a direct order in not immediately starting work; that she is disobeying known instruction to be at work during all work hours; and not to be absent when not authorized and also consider her behavior in leaving was close to gross insubordination. I would appreciate your inserting this memorandum in her personnel file and further action will warranted; either dismissal if she does not return or a letter of reprimand or other

> disciplinary action because of leaving her work place without authorization.

While this memorandum on its face was Deans', he testified that Lewandowski assisted "in the use of proper grammar, proper phraseology, punctuation, those kinds of things"; in fact, that the original longhand draft was written by Lewandowski. Deans conceded that Lewandowski never before had involved himself in Deans' memoranda to such an extent.

Hearing nothing in the interim, Tate returned to work on July 18, only to be told by Williams that a termination letter had been sent. She then left. The letter, dated July 13 and received by her a day or so after Williams' disclosure, was signed by Deans. It stated:

> You are hereby notified that you have been officially terminated from employment as of 10: A.M., Friday, July 13, 1979, for being absent from work without proper authorization.

Respondent's manual of personnel policies then in effect provided that "leave of absence may be granted for illness or other urgent or vital personal reasons," and that "approval must be obtained from the General Manager in writing." Lewandowski testified that he granted a leave of absence to an employee in 1974 or 1975 because of pregnancy, but that he denied the request of Suzy Holman, a supervisor, in the summer of 1979. Holman's husband was assuming custody of his children by a previous marriage, and she wished to be at home with them for a time. Lewandowski rejected the request because it was not a "real emergency situation," beyond which he was concerned about her being suitably replaced should her absence turn into "an extended-type thing."

Tate was prominently prounion. Several organizational meetings were held in her home, she signed an authorization card, and she distributed cards to her coworkers. Her union sympathies were "common knowledge" to management, according to Deans, and were "a source of discomfort" to him. Deans elaborated that he thought some of her duties as his secretary were incompatible with her having union representation; and that, the way he "looked at it," the only way out of her dilemma was for her either to renounce the Union or be terminated. Deans continued that he spoke with Lewandowski and Williams about this "several times"; and that, "shortly after" one such discussion, near the "end of June," Williams instructed him to "document any errors" in Tate's work. This instruction was forthcoming, according to Deans, because of the persistency of mistakes by Tate.[19]

A few days before her discharge, Tate was introduced by Deans to two new employees as "our union rabble-rouser." Tate credibly testified of an incident in March 1979 in which Cronk, after saying that she was slated to attend a training session in April, "if you're still here," commented: "Oh, I shouldn't say that; you will file an unfair labor practice charge against me."

Respondent took the position in the pre-election hearing that Tate should be excluded from the bargaining

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[19] Yet, in a letter of recommendation written about a month before Tate's discharge, Deans stated that she performed her duties "in a highly efficient and professional manner with a minimum of supervision," and was considered to be "a very productive and valuable employee."

unit on the ground that she was a confidential employee. The acting Regional Director rejected that position in his Decision and Direction of Election. On Respondent's request for review, the Board sustained the Director. Respondent next challenged Tate's ballot, contending that changes in her duties since the representation hearing had rendered her a confidential employee. This contention likewise was rejected by the acting Regional Director, in a supplemental decision dated June 26, 1979. The Director again was sustained by the Board, as concerns Tate, by an order issuing on August 17.

Tate began working for Respondent in November 1978.

Conclusions. It is concluded that the suspension and discharge of Tate were prompted by her union sympathies and activities, thereby violating Section 8(a)(3) and (1) as alleged.[20] It is further concluded that Deans' remark to Tate on July 3 that he had been thinking of

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[20] Despite the recurrent determinations to the contrary in the representation case, Respondent persists in its contention that Tate was a confidential employee. It further contends that, as such, she is outside the protection of the Act. The Board recently stated in *Los Angeles New Hospital,* 244 NLRB No. 157, slip op. 6 fn. 4 (1979): "[T]hat confidential employees do not enjoy protection under the Act, although consistent with the decisions of several courts of appeals, is, with all respect to those courts of appeals, inconsistent with current Board law." The Board continued, in the same footnote: "It is well settled that it is the duty of an Administrative Law Judge to apply established Board precedent which the Supreme Court has not reversed." To like effect are *Peavey Company,* 249 NLRB No. 110, slip op. 2 fn. 3 (1980), and *Hendricks County Rural Electric Membership Corporation,* 236 NLRB 1616, 1619 (1978).

suspending her, and on July 10 that she would "probably be fired" if she failed to report for work, were similarly motivated, thus violating Section 8(a)(1) as alleged.

These conclusions derive from this aggregate of factors:

a. It was "common knowledge" among management that Tate was prominently prounion.

b. Tate's union sympathies were "a source of discomfort" to Deans, who felt that her duties as his secretary were incompatible with her having union representation. Deans not only spoke "several times" with Lewandowski and Williams about this, but felt that the only solution was for Tate either to renounce the Union or be terminated.

c. That Respondent was intent upon building a case against Tate, giving colorable validity to a later imposition of sanctions, is revealed by Williams' having instructed Deans in late June – i.e., perhaps one week before her suspension and two before her discharge – to "document any errors" in her work. The weight of evidence, including Deans' previous letter of recommendation, indicates that Tate was a more-than-adequate employee, and undercuts the *bona fides* of such a documentation procedure.

d. The general merriment surrounding the spoiled-food incident tends to corroborate Tate that she was "just goofing areound" during her momentary absence from the switchboard. Also corroborative is Cronk's admission that it did not occur to him until later, "after a few minutes of contemplation," that Tate's behavior was

"inappropriate." This suggests that Tate's conduct neither was nor was perceived as being of a seriousness warranting any kind of discipline, let alone a three-day suspension, but was seized upon as a convenient pretext to punish her for her union involvement.

e. Regarding the discharge, the stated reasons for denying the leave of absence are unconvincing, indicating that the denial was in the expectation that Tate nevertheless would follow the doctor's recommendation; thereby presenting Respondent with a sure-fire chance to terminate her for "insubordination." Lewandowski's professed reservations over the form of the doctor's note can only be described as the quibbling of one with an ulterior motive. The same can be said of this checking with the clinic concerning the note's genuineness, but not bothering to inquire into the nature and seriousness of Tate's health problem.

Equally as transparent is the assertion that Deans could not spare Tate because of workload considerations. Her request was for only one week's leave, Respondent seemingly had no hesitancy about workload when it unlawfully suspended her a few days before, and temporary fill-in help apparently was readily available.[21]

f. Lewandowski's heavy involvement in the matters immediate to Tate's discharge – even to the point of writing the rough draft of the memorandum to the director of personnel that issued in Deans' name – indicates that this was seen as a matter of great sensitivity in which

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[21] The record suggests that, starting on about July 11, Respondent used a Kelly Girl as a temporary fill-in for Tate.

policy considerations transcended those usually obtaining when adverse action against an employee is contemplated.

VI. Conclusions of Law

Respondent violated Section 8(a)(5) and (1) by:

a. Abrogating Article XVII of the 1977-1980 bargaining agreement, as concerns the allocation of pension-plan dividends, effective January 1, 1979, without valid consent from the Union.

b. Failing to comply fully and promptly with the Union's requests of May 31 and August 16, 1979, for information underlying Respondent's decision to alter the application of dividends under its pension plan.

Respondent violated Section 8(a)(3) and (1) by:

a. Suspending Katherine Tate on July 5, 1979, and discharging her on July 13.

b. Issuing a written reprimand, dated July 5, 1979, to Kathleen Gunton.

Respondent violated Section 8(a)(1) by:

a. Cronk's telling Barbara Hightower on March 9, 1979, that Lewandowski "had put a blanket on all raises . . . because of the filing" of an election petition; his saying to her that she "probably" would not get a raise "if the Union comes in," but that she probably would "if the Union doesn't come in"; and his asking her why the employees "were filing for a union."

b. Lewandowski's issuing memoranda on June 26 and July 20, 1979 that indicated to the employees that the Union's election victory, and the organizational effort that preceded it, not only were a futility, but would cause them economic detriment.

c. Deans' remarking to Tate on July 3, 1979, that he had been thinking of suspending her, and on July 10 that she would "probably be fired," both statements having been prompted by Tate's union sympathies and activities.

ORDER[22]

Respondent, Intermountain Rural Electric Association, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Brotherhood of Electrical Workers, Local No. 111, as the representative of the employees in the appropriate unit described below, by abrogating Article XVII of the 1977-80 bargaining agreement between Respondent and the Union, as concerns the treatment of pension-plan dividends, or by abrogating any other provision of said agreement without the valid consent of the Union. The appropriate unit is:

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[22] All outstanding motions inconsistent with this recommended Order hereby are denied. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

All production and maintenance employees employed by IREA at and out of its Littleton, Colorado, place of business, and at or out of its branch places of business, including Castle Rock, Conifer, Strasburg, and Woodland Park, Colorado, including the warehouseman, the janitor, the assistant engineers, and chain and rod man; excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

(b) Refusing to bargain collectively with the Union, as the representative of the employees in the above unit, by failing to provide the Union, promptly upon request, with complete information underlying Respondent's decision to alter the application of dividends under its pension plan; or with any other information to which the Union is lawfully entitled as bargaining representative.

(c) Discharging, suspending, reprimanding, or otherwise discriminating against employees for engaging in union or concerted activities protected by the Act.

(d) Telling employees that "a blanket" has been put on raises "because of the filing" of a petition for a union election; and that raises probably will not be forthcoming "if the Union comes in," but probably will be "if the Union doesn't come in."

(e) Asking employees why the employees "were filing for a union."

(f) Indicating to the employees, by memoranda or otherwise, that the Union's election victory and the organizational effort preceding it were a futility and would cause them economic detriment.

(g) Telling employees, in response to their union sympathies and activities, that it is thinking of suspending them or that they will "probably be fired."

(h) In any like or related manner interfering with, restraining, or coercing employees in their exercise of rights under the Act.

2. Take this affirmative action:

(a) Rescind the change in the treatment of pension-plan dividends, effective January 1, 1979, as it affects employees in the above unit; and execute whatever documents, make whatever remittances, and otherwise do whatever is necessary to restore the situation, as concerns employees in the above unit, to that which would now obtain had the change never been made.[23]

(b) Promptly provide the Union with all documents and information requrested by it on May 31 and August 16, 1979, concerning the pension plan.

(c) Upon request, to the extent required by Section 8(d) of the Act, bargain collectively with the Union as the representative of its employees in the above unit, concerning contemplated changes in the terms or conditions of employment of those

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[23] The Union proposes in its brief that, as an alternative to restoration of the *status quo ante*, it be given the option of restoring and continuing the arrangement whereby Respondent made all pension contributions, with amounts withheld from employee pay for that purpose being refunded. This is rejected for the reason, earlier noted, that Respondent did not enter into a final and binding agreement to assume the participants' share of the contributions. To fashion a remedial scheme on the premise that it did would conflict with the Supreme Court's admonition that "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *N.L.R.B. v. American National Insurance Co.*, 343 US 395, 404 (1952). See, in addition, *H.K. Porter Co. v. N.L.R.B.*, 397 U.S. 99, 102 (1970).

employees; and, if an understanding is reached, embody it in a signed document.

(d) Offer to Katherine Tate immediate and full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges, discharging a replacement if necessary; and make her whole for any loss of earnings or benefits suffered by reason of her unlawful suspension and discharge in July 1979, with interest on lost earnings.[24]

(e) Expunge from its files and other records all copies of or references to the reprimand, dated July 5, 1979, that issued to Kathleen Gunton, and inform her in writing that this has been done.

(f) Preserve and make available, upon request, to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all records necessary to analyze the amounts of backpay and benefits owing under the terms of this Order.

(g) Post at its facilities in Littleton, Castle Rock, Conifer, Strasburg, and Woodland Park, Colorado, the notice which is attached and marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 27, after being duly

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[24] Backpay is to be computed in accordance with *F.W. Woolworth Company*, 90 NLRB 289 (1950), with interest to be computed as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

signed by Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated: September 29, 1980.

RICHARD J. BOYCE

Richard J. Boyce
Administrative Law Judge

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[25] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

(SEAL) (SEAL)

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

The trial held in Denver, Colorado, on November 14-16, 1979, in which we participated and had a chance to give evidence, resulted in a decision that we had committed certain unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, and this notice is posted pursuant to that decision.

Section 7 of the National Labor Relations Act gives all employees the following rights:

To organize themselves;

To form, join, or support unions;

To bargain as a group through a representative they choose;

To act together for collective bargaining or other mutual aid or protection;

To refrain from any or all such activity except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

WE WILL NOT refuse to bargain collectively with International Brotherhood of Electrical Workers, Local No. 111, as the representative of the employees in the appropriate unit described below, by abrogating Article XVII of the 1977-1980 bargaining agreement between

Respondent and the Union, as concerns the treatment of pension-plan dividends, or by abrogating any other provision of said agreement, without the valid consent of the Union. The appropriate unit is:

> All production and maintenance employees employed by IREA at and out of its Littleton, Colorado, place of business, and at or out of its branch places of business, including Castle Rock, Conifer, Strasburg, and Woodland Park, Colorado, including the warehouseman, the janitor, the assistant engineers, and chain and rod man; excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT refuse to bargain collectively with the Union, as the representative of the employees in the above unit, by failing to provide the Union, promptly upon request, with complete information underlying our decision to alter the application of dividends under our pension plan; or with any other information to which the Union is lawfully entitled as bargaining representative.

WE WILL NOT discharge, suspend, reprimand, or otherwise discriminate against employees for engaging in union or concerted activities protected by the Act.

WE WILL NOT tell employees that "a blanket" has been put on raises "because of the filing" of a petition for a union election; and that raises probably will not be forthcoming "if the Union comes in," but probably will be "if the Union doesn't come in."

WE WILL NOT ask employees why the employees "were filing for a union."

WE WILL NOT indicate to the employees, by memoranda or otherwise, that the Union's election victory and

the organization effort preceding it were a futility and would cause them economic detriment.

WE WILL NOT tell employees, in response to their union sympathies and activities, that we are thinking of suspending them or that they will "probably be fired."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in their exercise of rights under the Act.

WE WILL rescind the change in the treatment of pension-plan dividends, effective January 1, 1979, as it affects employees in the above unit; and execute whatever documents, make whatever remittances, and otherwise do whatever is necessary to restore the situation, as concerns employees in the above unit, to that which would now obtain had the change never been made.

WE WILL promptly provide the Union with all documents and information requested by it on May 31 and August 16, 1979, concerning the pension plan.

WE WILL, upon request, to the extent required by Section 8(d) of the Act, bargain collectively with the Union as the representative of our employees in the above unit, concerning contemplated changes in the terms or conditions of employment of those employees; and, if an understanding is reached, embody it in a signed document.

WE WILL offer to Katherine Tate immediate and full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges, discharging a replacement if necessary; and make her whole for

any loss of earnings or benefits suffered by reason of her unlawful suspension and discharge in July 1979, with interest on lost earnings.

WE WILL expunge from our files and other records all copies of or references to the reprimand, dated July 5, 1979, that issued to Kathleen Gunton, and inform her in writing that this has been done.

INTERMOUNTAIN RURAL
ELECTRIC ASSOCIATION
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.

[APPENDIX B]

FILED
United States Court of Appeals
Tenth Circuit
APR 16 1984
HOWARD K. PHILLIPS
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION, *Petitioner,*	)	No. 81-1228
v.	)	
NATIONAL LABOR RELATIONS BOARD, *Respondent.*	)	

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Martin Semple (Good and Stettner, P.C. Denver, Colorado, were on the brief) for Petitioner

David Marshall, Attorney, National Labor Relations Board (Kenneth B. Hipp, Deputy Assistant General Counsel; Miriam Szapiro, Attorney; William A. Lubbers, General Counsel; John E. Higgins, Jr., Deputy General counsel; Robert E. Allen, Acting Associate General Counsel; Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, Washington, D.C., were on the brief) for Respondent

Before HOLLOWAY, MCWILLIAMS, SEYMOUR, Circuit Judges

HOLLOWAY, Circuit Judge

Intermountain Rural Electric Association (employer) appeals from a decision by the National Labor Relations Board (Board) finding that it had committed numerous unfair labor practices. This case was tried before an administrative law judge (ALJ). The employer was found to have violated § 8(a)(1), 8(a)(3) and 8(a)(5) of the National Labor Relations Act. 29 U.S.C. § 158(a). The Board affirmed the ALJ's decision, 253 N.L.R.B. 1153, III R. 1290. The employer petitioned for review and the Board cross-petitioned for enforcement.

I

The factual setting

A. Unchallenged unfair labor practices

The Board affirmed the ALJ's rulings, findings and conclusions, and adopted his recommended order. III R. 1290. The ALJ discussed the employer's unfair labor practices, and we only summarily outline those that the employer does not challenge. The so-called outside or production and maintenance employees had a collective bargaining agreement with the employer. A dispute arose concerning the feasibility of the pension plan agreed on in the collective bargaining agreement. The ALJ found that the employer violated § 8(a)(1) and (5) by unilaterally altering a mandatory bargaining subject during

the term of a bargaining agreement, III R. 1263,[1] and by failing to comply with the request for documents relevant to the duty of the International Brotherhood of Electrical Workers, Local No. 111 (Union) to represent its members. III R. 1264.[2] During the imbroglio surrounding the pension plan, a campaign to organize the employer's so-called inside or clerical employees began. For its actions during this campaign, the employer was found to have violated § 8(a)(1) by unlawfully questioning and intimidating one of its employees, and by permitting memoranda to reach employees which threatened to obstruct the exercise of their rights under the Act. III R. 12.[3] The employer has not petitioned for review of these findings. Opening Brief of Petitioner at 12 n.2. Accordingly, they are entitled to summary enforcement. *Retail Clerks Union Local 1401 v. NLRB*, 463 F.2d 316, 320 (D.C. Cir. 1972); *Riverside Press, Inc. v. NLRB*, 415 F.2d 281, 284-85 (5th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970).

B. Challenged unfair labor practices

The employer has challenged the findings that it violated § 8(a)(1) and (3) when it suspended and

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[1] Unilaterally altering a mandatory bargaining subject while an agreement is in force violates the Act. *See NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 425 (1967); *NLRB v. Katz*, 369 U.S. 736, 742-43, 747 (1962).

[2] Failing to provide such documents can violate the Act. *See Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956); *Safeway Stores, Inc. v. NLRB*, 691 F.2d 953, 956-57 (10th Cir. 1982).

[3] Threatening employees with loss of benefits during an organizing campaign may violate § 8(a)(1). *E.g., McLane/Western Inc. v. NLRB*, 723 F.2d 1454, 1456 (10th Cir. 1983).

subsequently discharged Katherine Tate (Tate), and reprimanded Kathleen Gunton (Gunton). Both Tate and Gunton were active in orgainzing the inside or office employees. The catalyst for the employer's disciplinary action against Tate and Gunton was an incident on July 5, 1979. The ALJ found the following facts.

On July 5, irate utility customers, whose power had been cut off, left a bag of spoiled food in the reception area. After the customers departed, there was much merriment surrounding the incident. Mr. Cronk, the employer's operating manager, had attempted to assuage the irascible customers' mood. Cronk was "seemingly a willing participant in the fun." III R. 1273. The spoiled groceries were near Tate who was operating the switchboard. When Cronk began to leave, Tate asked that he take the garbage with him; she said that if he did not she would put it on his desk. Cronk refused. When Tate said that she did not sit with trash, Cronk retorted "[g]o ahead and have a wildcat walkout." III R. 1273; *see also* I R. 122 (testimony of Tate). Upon hearing this, Tate picked up her belongings and began to leave the area. Before she had gone far, a call came through the switchboard. She returned to answer it, and finished out her shift. I R. 122 (testimony of Tate); I R. 555 (testimony of Cronk).

Cronk returned to his office and "after a few minutes of contemplation" became upset with Tate. I R. 122 (testimony of Tate); I R. 555 (testimony of Cronk). He reported her action to Mr. Deans – Tate's immediate supervisor and the Director of Electrical Engineering. Deans told Tate that she might be suspended and to see him after work. Thereupon Tate asked Gunton to be present (which

the employer strenuously denies) as a witness when she spoke with Deans.

After work, Gunton went to Tate's office work area. Two other clerical employees were there at the time. I R. 127, 131-32, 234. When Deans told Tate that she probably would be suspended, Tate looked out the door to Gunton. I R. 234. In response, Gunton entered Deans' office. Deans told Gunton to "get the hell out," and when she started to say something, he stood up and told her to get out. Gunton promptly left. For this incident she was given a written reprimand which went into her personnel file.

Tate was suspended for three days for her actions during the spoiled food incident. Upon her return, she showed Deans a note that she had from her doctor that "strongly" recommended that she be given a week off and that the company should not "underestimate the importance of this." Deans consulted Mr. Lewandowski, the employer's chief operating officer about Tate's requested leave of absence. Lewandowski phoned the clinic and learned that a doctor with the same name that appeared at the end of the letter was employed there. Lewandowski denied the request without any inquiry into the seriousness of Tate's health problem. I R. 444.[4]

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[4] Lewandowski testified that he denied Tate's request because: (1) she was needed at work: (2) in his opinion there was no medical emergency; and (3) there was no pressing reason to grant the request. I R. 405.

In a memorandum concerning this incident, Deans gave three reasons for denying Tate's request. Deans wrote that: (1) leaves of absences are only granted if they will not interfere

(Continued on following page)

When Tate learned that he request for leave had been denied, she said that she had to follow her doctor's orders. Deans told Tate that if she were not at work she would probably be fired. Tate said she would return in a week and left. Tate was fired when she failed to appear for work.

As to Gunton the ALJ concluded, and the Board agreed, that by entering Deans' office on Tate's behalf and proposing that an attempt be made to reach Cronk for clarification of Tate's job status, Gunton had joined with Tate "for the purpose of . . . mutual aid and protection," which was protected by § 7 of the Act, so that the ensuing reprimand of Gunton violated § 8(a)(1). Further, it was considered that the reprimand of Gunton, while triggered by Gunton's activities in aid of Tate, in fact was in recrimination for her union sympathies and activities, thereby violating § 8(a)(3) in addition to § 8(a)(1).

As to Tate the ALJ concluded, and the Board agreed, that the 3-day suspension and subsequent discharge of Tate in July 1979 were prompted by Tate's union sympathies and activities, in violation § 8(a)(3) and (1); that these conclusions were drawn because of common

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(Continued from previous page)

with the efficient operation of the company; (2) Tate was needed because her suspension had produced a backlog of work, and (3) the doctor's note did not state that a medical emergency existed. III R. 1275-76.

It also appears that the employer was suspicious that Tate intended to take a vacation if she were granted her requested leave. I R. 404. In fact Tate did take a trip during the week she was absent from work. I R. 180-81.

knowledge among management that Tate was prominently prounion; the the employer had been intent on building a case against Tate; that the spoiled-food incident was seized on as a convenient pretext for punishing Tate for her union involvement; that the reasons for denying her requested leave were unconvincing; and that the July 5, 1979 suspension and July 13 discharge of Tate were in violation of § 8(a)(3) and (1). III R. 1278-79.

In addition the ALJ noted that despite recurrent determinations to the contrary in the representation case, the employer persisted in contending Tate was a confidential employee and, as such, was outside the protection of the Act. No findings were made on the factual nature of Tate's status as secretary to Deans, or whether Tate's position was such that she was a confidential employee assisting and acting in a confidential capacity to those handling management policies in the field of labor relations – thus having a "labor-nexus" under Board decisions. *See NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 173 (1981). Instead of making such findings, the employer's confidential employee defense as to Tate's charges was rejected by the ALJ and the board by noting that the claim that confidential employees do not enjoy the protection of the Act is inconsistent with the current Board law.

On the basis of the findings and conclusions made the Board ordered remedial relief for Gunton and Tate, as well as on the unchallenged violations. In this review proceeding the employer argues that (1) the Board erred by refusing to allow the employer to relitigate the question of Tate's status as a confidential employee and, on review of the record, the evidence supports a finding that

Tate was such an employee; (2) the Board's finding that the employer violated the Act by dissmissing Tate for taking an unauthorized leave of absence is not supported by the record; (3) the Board applied an incorrect standard in determining that Tate's discharge violated the Act, not applying the *Wright Line* test; (4) the Board erred in finding that Tate's suspension for leaving her work station violated the Act; and (5) the Board erred in finding that Gunton's interruption of a confidential interview was protected concerted activity.

II

Tate's suspension and discharge

The ALJ determined that, in violation of § 8(a)(1) and (3), the employer suspended and subsequently discharged Tate because of her union sympathies and activities. III R. 1278. We must uphold findings of the Board if they are supported by substantial evidence, when viewed in the light that the record in its entirety furnishes. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *McLane/Western Inc., v. NLRB*, 723 F.2d 1454, 1457 (10th Cir. 1983); *Safeway Stores, Inc. v. NLRB*, 691 F.2d 953, 956 (10th Cir. 1982). We turn first to the question whether the record as a whole supports the Board's findings respecting Tate's suspension and discharge.

Substantiality of the evidence to support the findings

Tate was actively involved in union activities. I R. 102-04. The employer was aware of this. I R. 105, 107, 117, 150, 378, 409; Deposition of Deans at 47-48. When an employee who is active in union affairs is disciplined or

discharged, it can give rise to an inference of violative discrimination. *See NLRB v. First National Bank of Pueblo*, 623 F.2d 686, 692 (10th Cir. 1980) (recognizing that such an inference is permissible but not permitting it in view of employee's very limited union activity); *Head Division, AMF, Inc. v. NLRB*, 593 F.2d 972, 975 (10th Cir. 1979) (inference permitted where employee actively engaged in union activities); *NLRB v. Montgomery Ward & Co.*, 554 F.2d 996, 1002 (10th Cir. 1977) (permitting inference). Such discrimination must generally be proven by circumstantial evidence. *Head Division v. NLRB, supra*, 593 F.2d at 975; *see also McLane/Western, supra*, 723 F.2d at 1459 ("An employer's anti-union motive generally may be proven only by circumstantial evidence."). Buttressing this inference are statements made by Deans indicating his hostility towards Tate's union involvement. Deans admitted that Tate's union sentiments were a source of discomfort to him because of what he believed was the confidential nature of her duties. The way Deans "looked at it" either Tate would have to be terminated or she would have to agree not to belong to the union. Deposition of Deans at 73-74.[5]

It is also probative that the employer began keeping a file on Tate's errors soon after Deans became uncomfortable with Tate's union sentiments. Deposition of Deans 74, 75-79. This suggests that the employer sought

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[5] We note also that Tate testified that when Cronk told her that she was scheduled to attend training regarding a new phone system, he said "that is, if you're still here . . . , oh, I shouldn't say that. You will file an unfair labor charge against me." I R. 110.

to manufacture a case against Tate. Although the employer argues that the file was kept because of a legitimate concern with the quality of Tate's work, Opening Brief of Petitioner at 20, the ALJ found that the weight of the evidence demonstrated that Tate was a more than adequate employee. III R. 26. Despite the evidence that the employer has offered to refute this, the inference the Board has drawn has adequate support in the record,[6] and we will not disturb it. *See Worley Mills, Inc. v. NLRB*, 685 F.2d 362, 364 (10th Cir. 1982) ("We are unable to reevaluate the evidence when conflicting views have been presented and the Board has chosen a version which is adequately supported by the evidence."); *NLRB v. Wilhow Corp.*, 666 F.2d 1294, 1299, (10th Cir. 1981) ("We are not authorized to make contrary alternative inferences from the record evidence where there is substantial evidence to support the Board's determination.").

In addition, the circumstances surrounding both the suspension and discharge of Tate also support the Board's findings. As to the suspension, it was found that the atmosphere surrounding the spoiled food incident was jovial and that the incident was used as a pretext to punish Tate for her union sympathies. III R. 1273, 1278. There is substantial evidence that this was the case. Cronk admitted that there was kidding surrounding the

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[6] Deans wrote Tate a letter of recommendation. Although it was never typed, it did say that Tate was "capable of performing her duties in a highly efficient and professional manner." II R. 755. We recognize that the letter did close with a joke. However, we are not convinced that this demonstrates that the ALJ erred in believing that the rest of the letter was a sincere evaluation of Tate's performance.

incident. I R. 569-70. Moreover, Tate's discharge followed what the Board found to be an unlawfully motivated suspension of Tate. *Cf. McLane/Western v. NLRB, supra,* 723 F.2d at 1460 n.5 (timing of discharge supports unfair labor practice charge). Furthermore the events surrounding the denial of Tate's request for leave suggest that the employer was searching for a reason to discipline her. After Tate gave Deans the letter from her physician recommending that she be given a one week leave of absence, Deans took the letter to Lewandowski because Deans was unsure how to handle the matter. Although Tate's appearance suggested that she might have a health problem,[7] Lewandowski denied the request without making an inquiry into the seriousness of her health problem. I R. 443-44. For these reasons we hold that there was substantial evidence to support the Board's findings that Tate was unlawfully suspended and discharged.[8]

The employer argues that even if the General Counsel made a prima facie case of unlawful discharge, the employer demonstrated that its action would have been

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[7] Deans testified that Tate looked tired and her eyes were bloodshot when she presented the note from her doctor. Deposition of Deans at 37.

[8] We recognize that the Act does not permit interference with the employer's normal exercise of its right to hire and fire employees. That the Board may disagree with the employer's action is unimportant as long as the employer is free from illegal motivations. *See, e.g., McLane/Western, supra,* 723 F.2d at 1459; *NLRB v. First National Bank of Pueblo,* 623 F.2d 686, 693-94 (10th Cir. 1980). Here, however, we are satisfied that there was sufficient record evidence to support the Board's findings that the employer was unlawfully motivated in carrying out the suspension and dismissal of Tate.

taken regardless of illegal motivation; that Tate was absent without leave; that the General Counsel offered no evidence concerning Tate's physical or emotional condition; and thus under the *Wright Line* analysis which should have been followed, the finding of violation of § 8(a)(1) and (3) by Tate's discharge must be vacated. Opening Brief of Petitioner 31-35.

We find no fatal defect in the record on this point. The ALJ's conclusions, adopted by the Board and supported by the record, included the conclusion that the spoiled food incident was "seized upon as a convenient pretext to punish [Tate] for her union involvement;" that the employer "was intent upon building a case against Tate" which was inferrable from instructions given to Deans, within about one month before Tate's July 5, 1979, suspension and her July 13, 1979 discharge, to keep track of examples of error in Tate's work; that the weight of the evidence, including Deans' previous letter of recommendation of Tate, undercuts the bona fides of the documentation procedure; and that Lewandowski's professed reservations over the form of the doctor's note could only be described as the quibbling of one with an ulterior motive. II R. 1278-79. Thus the findings can fairly be read, with record support, to rule out the possibility of the employer's prevailing on the theory of a *Wright Line* defense and no remand is necessary to restate the findings in terms of *Wright Line* analysis. *See McLane/Western, supra,* 723 F.2d at 1461; *The Artra Group, Inc., v. NLRB,* ___ F.2d ___, ___, slip op. at 9-10 (10th Cir. March 15, 1984).

In sum, the record as a whole supports the Board's findings as to the unfair labor practice charges concerning Tate's suspension and discharge.

The employer's confidential employee defense

The employer strenuously contends that Tate was a confidential secretary and thus not entitled to the protection of the Act; that the employer was entitled to relitigate this issue in this unfair labor practice proceeding; and that it was denied this right.

We must agree that the employer was entitled to relitigate its assertions that Tate was a confidential employee. In an unfair labor practice proceeding under § 8(a)(1) and (3), the Board's regulations, 29 C.F.R. § 102.67(f) (1983),[9] do not prevent relitigation of common issues that were decided in an earlier representation hearing. This proceeding is not a subsequent "related" proceeding so that § 102.67(f) would bar relitigation of the confidential employee issue. *See NLRB v. Dillon Stores*, 643 F.2d 687 (10th Cir. 1981).[10]

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[9] Section 102.67(f) provides: The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

29 C.F.R. § 102.67(f) (1983).

[10] In *Dillon* we recognized that 29 C.F.R. § 102.67(f) "bars litigation of an issue determined in a representation hearing only when the subsequent hearing is a 'related' proceeding," *NLRB v. Dillon Stores, supra*, 643 F.2d at 690, and that "[m]ost courts addressing the issue have concluded that unfair labor practice proceedings under section 8(a)(1) or (3) are not so

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We must carefully delineate the Board's handling of this confidential employee defense asserted in the instant case in light of the similar problems and the holding of the Supreme Court in *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981). In *Hendricks*, the Court reviewed Board decisions before 1947, the Taft-Hartley Act, and its legislative history. It concluded that it had been the Board's practice before Taft-Hartley to apply a labor-nexus test to identify confidential employees excluded from bargaining units and that there was nothing in the Taft-Hartley legislative history providing support for the argument that Congress disapproved of that Board practice; that to the contrary the history indicated that Congress intended to leave that historic practice undisturbed. *Id.* at 185. Because there was no attack on the Board's finding that the confidential secretary there did not have a labor-nexus, the Court remanded with directions to enforce the Board's remedial order on the § 8(a)(1) charge. *Id.* at 191.

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related to prior representation hearings that relitigation of common issues is precluded." *Id.* We, therefore, held that it was permissible for the General Counsel to relitigate whether particular employees were supervisors so that the employer could be held responsible for their conduct, and guilty of an unfair labor practice. *See also Rock Hill Telephone Co. v. NLRB*, 605 F.2d 139 (4th Cir. 1979) (same as *Dillon); Heights Funeral Home, Inc. v. NLRB*, 385 F.2d 879 (5th Cir. 1967) (preventing employer from relitigating supervisory status is error requiring remand); *Amalgamated Clothing Workers of America v. NLRB*, 365 F.2d 898 (D.C. Cir. 1966) (same as *Heights Funeral Home).* Because 8(a)(1) and (3) charges are at issue in the instant case, § 102.67(f) would not bar relitigation of issues decided in the previous representation hearing.

The Court did not decide the broad question which Board counsel argues in the instant case, namely that all confidential employees are properly entitled to the protection of the Act. The Court was not called on to decide the propriety of the Board's practice of affording even "labor-nexus" employees some protections of the Act, and the question was not addressed. *Id.* at 185-86, n.19.

As the employer points out in the instant case, evidence was presented here concerning confidential information to which Tate was privy. The employer says Tate, who was secretary to Deans, the Director of Electrical Engineering, acted in a confidential capacity as to Deans, that her work placed her in a position of confidence where she had access to confidential information, that the evidence showed Tate was privy to important information other than labor relations matters not available to the public, that Deans fulfilled an important role in formulating and implementing labor relations policy of the employer, and also that as Deans' confidential secretary Tate typed memoranda on the employer's position on issues being negotiated with the union. Opening Brief of petitioner 14-16. The employer argues that under either the broad definition that all confidential secretaries are excluded from coverage of the Act (as the Seventh Circuit held in *Hendricks*), or the Board's definition limiting such confidential employees to those with a "labor-nexus," Tate was a confidential employee and accordingly she did not enjoy the protection of the Act.[11] Opening Brief of Petitioner 16-17.

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[11] When the employer sought to raise the issue of Tate's confidential status in this unfair labor practice proceeding, the

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We noted earlier that the ALJ's findings, adopted by the Board, did not determine the status or type of relationship Tate had under the *Hendricks* classifications. Instead the ALJ and the Board acknowledged the assertions of the employer, referred to the earlier determinations by the Regional Director against the employer's assertions that Tate was a confidential employee, and then dismissed the employer's assertions that Tate did not enjoy the protection of the Act as contrary to current Board law. III R. 1278 n.20.

Since the employer's arguments were advanced the Supreme Court has decided *Hendricks*. The employer's

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ALJ tentatively sustained an objection that this issue was foreclosed because the employer had earlier litigated this question and lost. I R. 152-54. The ALJ, however, recognized that the area was not free from doubt, and told the employer's counsel to bring citations to supporting authorities in the following morning if he wanted to pursue supporting authorities in the following morning if he wanted to pursue the matter. I R. 154. The following morning, the ALJ considered the employer's authorities and ruled that he would permit the record in the representation case to be made part of the record in the unfair labor practice proceeding. Additionally other evidence on this issue could be admitted as long as it did not duplicate material that was part of the record in the representation case. I R. 189-97.

The employer put on evidence that Tate was a confidential employee, and that she did have access to confidential material pertaining to labor relations matters. I R. 376-79, 392-99, 446-47, 458-59, 461-62, 510-13, 589-91. However, as we have explained, the ALJ did not rule on Tate's status. Rather he reasoned that even if Tate were a confidential employee, it is Board policy that she is nevertheless protected by the Act.

contention based on the Seventh Circuit's view in *Hendricks* – that all confidential secretaries are excluded from the Act, without regard to labor relations information – is now untenable. However the additional contention of the employer that Tate was a confidential secretary with a labor-nexus must be considered. We feel that there was sufficient evidence presented on this theory that it might be found that Tate was within that category, being a confidential secretary having a labor-nexus. This was not determined by the Board's findings. Without such a factual determination by the Board, which has that fact-finding function, we should not dispose of the alternate contention of the employer that Tate did not enjoy the protection of the Act because she was a confidential secretary with a "labor-nexus."

We conclude that we should not rule on the part of the case relating to Tate on what would be essentially a hypothetical question, *i.e.*, was she entitled to the protection of the Act assuming that she was a confidential employee. Fact-finding on that question and the degree of sensitivity of information to which Tate was privy could be of critical importance. In the posture in which the instant case comes to us, we do not know if we have a "labor-nexus" confidential employee issue. The Board avoided the question and made no findings on the status or relationship of Tate. If it were determined that Tate was not a confidential secretary, assisting and acting in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations, then she would be in a position like the secretary in *Hendricks* and the Board should afford remedial relief on the unfair labor practice charges.

Accordingly, while we uphold the Board's findings against the challenge that the record does not support the findings of unlawful suspension and discharge, we must remand the portion of the case relating to Tate. The confidential employee defense cannot be properly decided until the Board makes proper findings as to whether Tate was a confidential secretary with a labor-nexus, or whether she was outside that classification. We remand this part of the case for further proceedings the Board deems necessary, for findings and conclusions on the confidential employee defense in light of the classifications identified in *Hendricks*, and for an order thereon. We have not, and do not intend by this opinion, to rule on the question of law whether confidential employees having a labor-nexus are entitled to the protection of the Act against unfair labor practices of the type involved here. That issue remains for the Board to rule on in the first instance if required by the findings it makes on the confidential employee defense.

III

Gunton's reprimand

The ALJ found that reprimanding Gunton for her actions in trying to come to the aid of Tate in Deans' office violated § 8(a)(1) because Gunton had joined with Tate for mutual aid and protection. The reprimand therefore interfered with the exercise of § 7 rights. 29 U.S.C. § 157. In addition, the ALJ found that the reprimand was in recrimination for Gunton's union activities and thereby constituted independent § 8(a)(1) and (3) violations, which include discouragement of union membership. III R. 1272. The employer argues that Gunton's

action was neither concerted nor protected. Opening Brief of Petitioner 9-12, 38-42. We are convinced, however, that the record supports the finding of concerted and protected activity. We also conclude that there is substantial evidence to support the finding of unlawful discrimination in reprimanding Gunton because of her union activities.

The Board concluded that Gunton, by entering Deans' office on Tate's behalf and proposing that an attempt be made to reach Cronk for clarification of Tate's job status, joined with Tate for the purpose of mutual aid and protection. III R. 1272. This mutually protective action was undertaken by two employees who had been active in the effort to organize the office employees. The Board's holding is a permissible construction of "concerted activities for . . . mutual aid or protection" by the agency charged by Congress with enforcement of the Act, and should be sustained. *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 260 (1975); *see NLRB v. Modern Carpet Industries, Inc.*, 611 F.2d 811, 813-14 (10th Cir. 1979); *NLRB v. Empire Gas, Inc.*, 566 F.2d 681, 686 (10th Cir. 1977) (question whether activities are protected by the Act is one on which courts defer to Board expertise); *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-06 (2d Cir. 1942) (opinion of L. Hand, J., quoted by the Supreme Court in *Weingarten*, 420 U.S. at 261).[12] We thus conclude

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[12] We note that the Supreme Court's recent decision in *NLRB v. City Disposal Systems, Inc.*, ___ U.S. ___, ___, 52 U.S.L.W. 4360, 4363 (U.S. March 21, 1984), discusses the § 7 recognition of the acts of joining and assisting a labor organization as concerted. The Court then discussed individual employee assistance to a labor organization and noted that

(Continued on following page)

that the Board's finding of the separate § 8(a)(1) and (3) violations by the written reprimand of Gunton is supported by the record.

It was also concluded by the Board that the reprimand of Gunton, while triggered by her activities in behalf of Tate, was in recrimination for her union sympathies and activities. III R. 1272. This conclusion is also supported by the record. It was widely known that Gunton was a prime mover in the union organizing effort, I R. 228, 409, 571-72, and the employer admits that she was. Opening Brief of Petitioner 10. As noted, when an employee who is active in union affairs is discharged, it can give rise to an inference of violative discrimination. *See First National Bank of Pueblo, supra,* 623 F.2d at 692; *Head Division AMF, Inc. v. NLRB, supra,* 593 F.2d at 975; *Montgomery Ward, supra,* 554 F.2d at 1002. Gunton testified that her involvement with the union organizing campaign was very strong. I R. 228. The testimony of Stanley Lewandowski, the employer's chief operating officer, and of Spencer Cronk, the employer's director of operations, make clear that the employer was aware of Gunton's active support for the union. I R. 409, 571-73.

(Continued from previous page)

"[b]ecause of the integral relationship among the employees' [organizational] actions, however, Congress viewed each employee as engage in concerted activity." *Id.* The actions of Gunton in assisting her fellow union supporter Tate, whose status was threatened, could reasonably be found to be protected concerted activity, as the Board did.

Further, the employer committed other unfair labor practices.[13] This fact suggests that the employer was hostile to the union, and the presence of anti-union animus lends support to the inference that Gunton was unlawfully reprimanded. *See NLRB v. Automotive Controls Corp.*, 406 F.2d 221, 226 (10th Cir. 1969) (upholding Board finding of unlawful discharge and permitting Board to rely in part on evidence of company's anti-union amimus as demonstrated by § 8(a)(1) violations); *NLRB v. Georgia Rug Mill*, 308 F.2d 89, 91 (5th Cir. 1962) (anti-union bias is significant factor in determining motive); *see also NLRB v. Eagle Material Handling, Inc.*, 558 F.2d 160, 166 (3rd Cir. 1977) ("prior unfair labor practives demostrate the company's propensity for [violating the Act] and suggest that its post-election grant of benefits was likewise improperly motivated.").

We are also convinced that the record supports an inference that Gunton was discriminatorily disciplined. The written reprimand of Gunton said that she entered Deans' office without authorization and with no official duties to perform, and that employees were not authorized to visit other areas of the building after working hours unless they had authorization or official business to conduct. Though the evidence indicates that other

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[13] The employer has not challenged findings that it committed unfair labor practices by (1) unilaterally altering a mandatory bargaining subject during the term of an agreement; (2) failing to provide the union with documents relevant to its duty; (3) unlawfully questioning employees about their union sympathies; and (4) permitting threatening memoranda to reach employees.

employees stayed in the building after hours,[14] Lewandowski's testimony establishes that only Gunton received a written reprimand for such conduct between January 1978 and November 1979 when the ALJ heard the case. I R. 15. That only Gunton was disciplined for activity in which other employees engaged further supports the conclusion that her reprimand was in recrimination for her union activities. *Cf. Head Division, AMF, Inc. v. MLRB*, 593 F.2d 972, 975-76 (10th Cir. 1979) ("NLRB was not unreasonable in concluding that [employee]" was unlawfully discharged when he was only employee ever discharged for committing act – "without prior warning or attention to less extreme disciplinary sanctions"); *NLRB v. Big Three Industrial Gas & Equipment Co.*, 579 F.2d 304, 312 (5th Cir. 1978) ("otherwise valid rule may be discriminatorily applied to penalize those who assert rights protected under the Labor Act."), *cert. denied*, 440 U.S. 960 (1979); *NLRB v. Heck's Inc.*, 386 F.2d 317, 320 (4th Cir. 1967) ("well settled that enforcement of otherwise valid rule only against those engaging in union activities is discriminatory").

We conclude that the record as a whole supports the Board's finding that Gunton's reprimand was a violation of §§ 8(a)(1) and (3). Moreover, while the Board's findings do not go through the step-by-step *Wright Line* analysis, *see NLRB v. Transportation Management*, ___ U.S. ___, 51

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[14] Deans testified that when he went to his office to discuss the spoiled food incident with Tate, there were employees other than Gunton present. Deposition of Deans at 26. Another employee testified that she often stayed in the building after office hours while waiting for her softball practice to begin. I R. 276-78. *See also* I R. 127, 131-32, 234.

U.S.L.W. 4761 (1983), we are convinced that consideration was given to the theory of defense the employer asserts and that the rejection of it is supported by the record.[15] We conclude that the findings can fairly be read, with record support, to rule out the possibility of the employer's prevailing on a defense under the *Wright Line* theory; therfore a remand to restate the findings in terms of the *Wright Line* analysis is unnecessary. *See McLane/Western, supra,* 723 F.2d at 1461; *The Artra Group, Inc., v. NLRB,* ___ F.2d ___, ___, slip op. at 9-10 (10th Cir. March 15, 1984).[16]

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[15] For example, we note that the Board found that the terms of the reprimand of Gunton "betray[] pretext." II R. 1273.

[16] We are mindful of the fact that we are ordering enforcement of the remedial order as to Gunton premised on the conclusion that she and Tate were engaging in protected concerted activity, when the ultimate determination after these proceedings are all completed might be that Tate herself was not entitled to the protection of the Act. We feel, however, that his relief for Gunton would be proper even if Tate were ultimately held not to be entitled to the protection of the Act since, at the time Gunton acted, Tate had been determined to be within the bargaining unit and Gunton had a reasonable basis for joining Tate's cause in the protected concerted action.

We do not make a similar ruling in Tate's favor on the basis of justifiable reliance by Tate at that time on the earlier rulings because to do so would defeat the employer's right to relitigate its assertion that Tate was a confidential employee. Moreover, the remedial order as to Gunton would be proper also on the separate basis that the Board found that the employer's reprimand of Gunton was in recrimination for Gunton's prounion sympathies and activities, a separate §§ 8(a)(1) and (3) violation.

In sum, we uphold the Board's findings and conclusions concerning Gunton's written reprimand and will enforce the order thereon.

IV

For the reasons stated, the Board's order will be enforced in all respects except as to the suspension and discharge of employee Tate. With respect to the suspension and discharge of Tate, the case is partially remanded to the Board for further proceedings on the employer's confidential employee defense as provided herein, this court retaining jurisdiction following such proceedings to review determinations of the Board which are challenged and to consider any further application made for enforcement.

[APPENDIX C]

MAY TERM – JUNE 1, 1984

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION, *Petitioner,*	)	No. 81-1228
vs.	)	
THE NATIONAL LABOR RELATIONS BOARD, *Respondent,*	)	

This matter comes on for consideration of petitioner's petition for rehearing and suggestion for rehearing en banc in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be

polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS

Howard K. Phillips, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION, *Petitioner,*	)	No. 81-1228
VS.	)	
NATIONAL LABOR RELATIONS BOARD, *Respondent,*	)	

JUDGMENT

Before: HOLLOWAY, MCWILLIAMS, SEYMOUR, Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by Intermountain Rural Electric Association, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on January 8, 1981, and upon a cross-application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on September 15, 1982, and has considered the briefs and transcript of record filed in this cause. On April 16, 1984, the Court, being fully advised in

the premises, issued its opinion granting enforcement of the Board's order in part and remanding it in part. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Intermountain Rural Electric Association, Littleton, Castle Rock, Conifer, Strasburg, and Woodland Park, Colorado, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Brotherhood of Electrical workers, Local No. 111 (hereinafter called the Union), as the representative of the employees in the appropriate unit described below, by abrogating article XVII of the 1977-80 bargaining agreement between Petitioner and the Union as concerns the treatment of pension plan dividends or by abrogating any other provision of said agreement without the valid consent of the Union. The appropriate unit is:

All production and maintenance employees employed by IREA at and out of its Littleton, Colorado, place of business, and at or out of its branch places of business, including Castle Rock, Conifer, Strasburg and Woodland Park, Colorado, including the warehousemen, the janitor, the assistant engineers, and chain and rod man, excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

(b) Refusing to bargain collectively with the Union, as the representative of the employees in the above unit, by failing to provide the Union, promptly upon request, with complete information underlying Petitioner's decision to alter the application of dividends under its pension plan or with any other information to which the Union is lawfully entitled as bargaining representative.

(c) Reprimanding, or otherwise discriminating against employees for engaging in union or concerted activities protected by the National Labor Relations Act (hereinafter called the Act).

(d) Telling employees that "a blanket" has been put on raises "because of the filing" of a petition for a union election, and that raises probably will not be forthcoming "if the Union comes in," but probably will be "if the Union doesn't come in."

(e) Asking employees why the employees "were filing for a union."

(f) Indicating to the employees, by memoranda or otherwise, that the Union's election victory and the organizational effort preceding it were a futility and would cause them or that they will "probably be fired."

(g) Telling employees, in response to their union sympathies and activities, that it is thinking of suspending them or that they will "probably be fired."

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action:

(a) Rescind the change in the treatment of pension plan dividends, effective January 1, 1979, as it affects employees in the above unit, and execute whatever documents, make whatever remittances, and otherwise do whatever is necessary to restore the situation, as concerns employees in the above unit, to that which would now obtain had the change never been made.

(b) Promptly provide the Union with all documents and information requested by it on May 31 and August 16, 1979, concerning the pension plan.

(c) Upon request, to the extent required by Section 8(d) of the Act, bargain collectively with the Union as the representative of its employees in the above unit concerning contemplated changes in the terms or conditions of employment of those employees, and, if an understanding is reached, embody it in a signed document.

(d) Expunge from its files and other records all copies of or references to the reprimand, dated July 5, 1979, issued to Kathleen Gunton, and inform her in writing that this has been done.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all records necessary to analyze the amount of backpay and benefits owing under the terms of this Judgment.

(f) Post at its facilities in Littleton, Castle Rock, Conifer, Strasburg, and Woodland Park, Colorado, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 27 of the National Labor Relations Board (Denver, Colorado), after being duly signed by Petitioner's representative, shall be posted by Petitioner immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Petitioner to

insure that said notices are not altered, covered, or defaced by any other material.

(g) Notify the aforesaid Regional director, in writing, within 20 days from the date of this Judgment, what steps Petitioner has taken to comply herewith.

Judge, United States Court of Appeals for the Tenth Circuit

Dated: .....

APPENDIX

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING IN PART AND REMANDING IN PART AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice:

The Act gives employees the following rights:

To engage in self-organization.

To form, join, or assist any union.

To bargain collectively through representatives of their own choice.

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection.

To refrain from the exercise of an or all such activities.

WE WILL NOT refuse to bargain collectively with International Brotherhood of Electrical Workers, Local No. 111, as the representative of the employees in the appropriate unit described below, by abrogating article XVII of the 1977-80 bargaining agreement between us and the Union, as concerns the treatment of pension plan dividends, or by abrogating any other provision of said agreement, without the valid consent of the Union. The appropriate unit is:

All production and maintenance employees employed by IREA at and out of its Littleton, Colorado, place of business, and at or out of its branch places of business, including Castle Rock, Conifer, Strasburg, and Woodland Park, Colorado, including the warehousemen, the janitor, the assistant engineers, and chain and rod man, excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT refuse to bargain collectively with the Union, as the representative of the employees in the above unit, by failing to provide the Union, promptly upon request, with complete information underlying our decision to alter the application of dividends under our pension plan; or with any other information to which the Union is lawfully entitled as bargaining representative.

WE WILL NOT reprimand or otherwise discriminate against employees for engaging in union or concerted activities protected by the Act.

WE WILL NOT tell employees that "a blanket" has been put on raises "because of the filing" of a petition for a union election; and that raises probably will not be forthcoming "if the Union comes in," but probably will be "if the Union doesn't come in."

WE WILL NOT ask employees why the employees "were filing for a union."

WE WILL NOT indicate to the employees, by memoranda or otherwise, that the Union's election victory and the organizational effort preceding it were a futility and would cause them economic detriment.

WE WILL NOT tell employees, in response to their union sympathies and activities, that we are thinking of suspending them or that they will "probably be fired."

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights under the Act.

WE WILL NOT rescind the change in the treatment of pension plan dividends, effective January 1, 1979, as it affects employees in the above unit; and execute whatever documents, make whatever remittances, and otherwise do whatever is necessary to restore the situation, as concerns employees in the above unit, to that which would now obtain had the change never been made.

WE WILL promptly provide the Union with all documents and information requested by it on May 31 and August 16, 1979, concerning the pension plan.

WE WILL, upon request, to the extent reuired by Section 8(d) of the Act, bargain collectively with the Union as the representative of our employees in the above unit, concerning contemplated changes in the terms or conditions of employment of those employees, and, if an understanding is reached, embody it in a signed document.

WE WILL expunge from our files and other records all copies of or references to the reprimand, dated July 5, 1979, that was issued to Kathleen Gunton, and inform her in writing that this has been done.

INTERMOUNTAIN RURAL
ELECTRIC ASSOCIATION

(Employer)

Dated_____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, U.S. Custom House, Room 260, 721 19th Street, Denver, Colorado 80202, Telephone 303-837-3551.

[APPENDIX D]

DDeB

277 NLRB No. 3

D--3225
Littleton, Castle Rock,
Conifer, Strasburg, and
Woodland Park, CO

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERMOUNTAIN RURAL
ELECTRIC ASSOCIATION

and

Cases 27--CA--6151
27--CA--6280
27--CA--6305

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
LOCAL NO. 111

SUPPLEMENTAL DECISION AND ORDER

On 8 January 1981 the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding[1] finding that the Respondent violated Section 8(a)(5), (3), and (1) of the Act by unilaterally abrogating terms of a collective-bargaining agreement with the Union concerning the allocation of pension plan dividends; failing to comply with the Union's requests for information regarding its decision to change the application of pension funds; suspending and discharging Katherine Tate and issuing a written reprimand to Kathleen Gunton because they engaged in protected concerted activities; threatening employees with suspension or discharge because of their union sympathies and

[1] 253 NLRB 1153.

activities; interrogating employees; linking employees' economic benefit to the absence of the Union and their economic detriment to the Union; and warning employees that unionization would be futile. The Board ordered the Respondent to cease and desist from these unlawful activities and to take certain affirmative steps to remedy the effects of its actions.

Thereafter, the Respondent petitioned the United States Court of Appeals for the Tenth Circuit for review of the Board's Order and the Board filed a cross-application for its enforcement. On 16 April 1984 the court issued its decision,[2] which sustained all of the Board's unfair labor practice findings and enforced all of the provisions of its Order except those pertaining to employee Tate. Although the court found substantial evidence supports the Board's conclusion that the Respondent suspended and discharged Tate in retaliation for her union activities, it found that the Respondent was entitled to relitigate its assertion that Tate was a confidential employee. The court stated that the Respondent should not be barred from relitigating this issue during the instant unfair labor practice case simply because the same issue had been raised and litigated in an earlier and, according to the court's findings, unrelated representation proceeding. The court found that the Respondent presented sufficient evidence on the theory that Tate was a confidential secretary with a labor nexus that the Board could properly make a finding as to whether Tate falls into that category.[3] Should the Board find that Tate is a

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[2] 737 F.2d 754.

[3] The court noted that the Supreme Court had issued its decision in *NLRB v. Hendricks County Rural Electric Corp.*, 454

(Continued on following page)

confidential employee, the court held it would then be for the Board to decide the Respondent's further contention that confidential employees fall outside the protection of the Act and that its actions involving Tate therefore cannot be held to violate the Act. Accordingly, the court remanded the case to the Board for a determination on these issues.

On 1 October 1984 the Board advised the parties that it had decided to accept the court's remand and that they could submit statements of position with respect to the issue of Tate's confidential status. Thereafter the General Counsel filed a statement of position and the Respondent filed a brief on remand and a request for oral argument.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record as a whole, the decision of the United States Court of Appeals for the Tenth Circuit remanding the proceeding, and the statements filed by the General Counsel and the Respondent.[4]

(Continued from previous page)

U.S. 170 (1981), after the parties had presented oral argument in the instant case. In *Hendricks* the Court reversed the Seventh Circuit and held that there is a reasonable basis for the Board's use of the "labor nexus" test for confidential employees. The Respondent had relied in substantial part on the seventh Circuit's rejection of that test.

[4] The Respondent's request for oral argument is denied as the record, statements of position, and briefs adequately present the issues and the positions of the parties.

As stated above, the issue of Tate's confidential status was first considered by the Board during a representation proceeding. In a Decision and Direction of Election dated 21 March 1979 in Case 27--RC--5809 the Acting Regional Director found that Tate had been hired as the secretary to Director of Engineering Mike Deans approximately 3 months prior to the date of the hearing. Her duties consisted of typing and answering the telephone for Deans and others in the department, as well as regularly filling in at the Respondent's switchboard and occasionally performing work for Assistant General Manager Fred Williams. The Acting Regional Director concluded that the evidence presented at the hearing demonstrated that Tate did not assist or act in a confidential capacity to any person who formulates, determines, and effectuates management policies with regard to labor relations. Accordingly, he included her in the unit. The Respondent filed a request for review of the Acting Regional Director's determination of Tate's status. The Board denied the Respondent's request on 12 April 1979.

In the representation election held on 13 April 1979, the Respondent challenged Tate's ballot, asserting that she is a confidential employee. The Acting Regional Director's Supplemental Decision on Challenged Ballots overruled the Respondent's challenge, finding that Tate's duties regarding confidential labor relations matters had not changed between the time of the representation hearing on 2 March 1979 and the date of the election 6 weeks later. On 17 August 1979 the Board affirmed the Acting Regional Director's determination with respect to Tate's ballot and denied the Respondent's request for review on this issue.

The unfair labor practice allegations in this case include 8(a)(3) and (1) issues relating to Tate's suspension and discharge as well as certain threats made against her because of her activities in support of the Union. In its defense against these allegations the Respondent contends that Tate was outside the protection of the Act because her position was of a confidential nature, thereby excluding her from the right to participate in union activities. Review of the record indicates that while the judge was reluctant to permit relitigation of Tate's confidential status, he nevertheless allowed the Respondent to introduce into evidence the record of the representation case as well as other relevant evidence on Tate's employment status. The judge did not, however, make an independent assessment of her alleged confidential status, deciding instead that he was bound by the Board's previous representation case determinations. In view of the completeness of the record now before us, it is necessary only to review this evidence to comply with the court's remand.[5]

Tate was hired in November 1978 as a secretary in the engineering department. She was referred to as the secretary to the director of the department Mike Deans, and was primarily responsible to him, but her duties encompassed the performance of general clerical tasks for others in the department as well. Testimony during the representation hearing establishes that as of that time, 2 March 1979,[6] Tate received and made records of telephone calls and visitors and typed for Deans and others

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[5] In their statements to the Board, no party had requested a further hearing.

[6] Dates herein refer to 1979 unless otherwise designated.

in the engineering department. In addition she regularly filled in at the Company's switchboard when the operator was on breaks. On occasion, when the secretary to Assistant General Manager Fred Williams was unavailable, Tate would type for him There was also one instance when Tate took minutes of a staff meeting, attended by Williams, Deans, Director of Operations Cowan, and Supervisors Logos, Miller, and Schroeder, dealing with the Employer's production and maintenance unit employees. Tate testified that she knew nothing about Deans' role in labor relations matters, that she did not type memoranda or correspondence concerning labor matters, that she did not accompany Deans to meetings concerning labor relations, that she did not type minutes of such meetings, and that Deans did not discuss with her the content of any such meetings he may have attended. Tate testified that she was told that information to which she had access was considered by the Company to be confidential.[7] According to the Supplemental Report on Challenged Ballots, Tate indicated that following the election she typed a memorandum stating that the Respondent would deal with the union at arm's length, another stating that the Respondent wanted to take meter readers out of the established unit and place them in the office

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[7] This refers to the engineering department's possession of documents and information relative to the Respondent's systems improvements, contracts with customer-users of the Respondent's underground and overhead facilities, information concerning substations and other equipment, and data concerning the Respondent's rebate program which involves substantial sums of money.

and clerical unit, and a third stating that working as a janitor would not qualify as relevant experience toward the attainment of a position as either warehouseman or groundsman. These documents do not appear in the record.[8]

Deans[9] stated that around the time of the representation hearing he had been involved in discussions with others in management concerning the Respondent's position on the confidential status of Tate's job. He said that he had doubts then concerning the Respondent's position that Tate was a confidential employee and that he discussed with Tate the fact that management viewed her as a nonbargaining unit confidential employee. However, Deans also stated that he did not have any detailed discussions with Tate concerning her job duties. Sometime after the 2 March representation hearing Deans informed Tate that she had a new job description. The document dated 1 February was admitted into evidence at the unfair labor practice hearing. Despite the fact that Tate was Deans' secretary, Deans did not participate in formulating this job description. Instead, Deans recalled receiving the document from the office of General Manager Stanley Lewandowski some time during the spring. According to Tate there were two new duties listed among her responsibilities: "Prepares confidential

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[8] Tate testified that following the representation hearing Deans told her that he had been requested by Personnel Director Tom Riffe to have her type a memo dealing with any subject so long as it related to labor relations.

[9] Deans did not testify in person at the unfair labor practice hearing, but his deposition was submitted into the record.

minutes taken at meetings involving highly sensitive labor relations matters" and "Prepares recommendations as provided by the Director of Electrical Engineering concerning confidential labor relations matters." Deans said that during her employment Tate typed three memoranda which related to labor relations. One concerned meter readers' unit placement; another consisted of Deans' suggestions regarding field engineers; and the third related to draftsmen and wage recommendations. Deans could not recall when any of these menus were typed. None of them was produced or offered by the Respondent. Deans stated that he considered several of the matters with which Tate dealt to be confidential, such as employees' annual reviews, probationary reviews, and memos to supervisors concerning problems with employees. None of these types of materials was introduced as an example of her work product.[10] Deans testified that Tate regularly took notes at the monthly engineering staff meeting.[11]

One memorandum typed by Tate which was introduced into evidence was from Richard Prahl, supervisor of engineering services, to Personnel Driector Riffe. The 3 March memo recommended that the Respondent take a

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[10] The Respondent did introduce examples of Tate's work for the purpose of demonstrating her deficiencies. These included departmental work orders and reports as well as correspondence for Deans. The only item which did not relate strictly to the Respondent's business operations was a general letter of reference on behalf of a former employee of the engineering department.

[11] Deans stated that this was not a supervisory meeting but included all employees in the engineering department.

"hard-nose" approach to bargaining with the office and clerical unit over health insurance benefits and extra holidays. Prahl stated that he was not solicited to provide suggestions at that time and that he had never before or since made recommendations of this nature. He did not explain what prompted him to pass along his suggestions in this instance.

Deans testified that his job involved supervising the office engineering department, engineering services, overhead and underground field engineering and drafting, and providing technical supervision over district field engineers. Deans' only other reference to his duties was that after the representation hearing he was requested to make recommendations on several items related to labor relations. However, he did not say who made this request or how he responded to it.

The assistant general manager of operations and engineering Fred Williams, Deans' direct superior, testified that since Deans had been in charge of the engineering department there had been only one contract negotiated, that being with the production and maintenance employees in the so-called "outside" unit. Williams said that Deans' role in that negotiation was to recommend salary and language changes. He recalled one instance in which Deans, in response to his solicitation of suggestions, made a recommendation regarding the salaries of engineering aides.

The Respondent's general manager Lewandowski testified that Deans was responsible for all engineering department personnel. He stated that these responsibilities included handling grievances and supplying

information for negotiations. Specifically, Lewandowski said that Deans reviewed the bargaining agreement covering the outside unit to check for problems in administering its terms, made suggestions concerning contract language, and attended strategy meetings. Lewandowski stated that because the outside contract was for a 3-year term, Deans did not have occasion within the past year to be involved in bargaining matters. Lewandowski did not cite specific examples of Deans' input prior to entering into that agreement. Lewandowski testified that it was possible that Deans could play a role at the bargaining table in future negotiations. There is no evidence that Deans has sat at the bargaining table in the past or that he has done so since the date of the hearing.[12] A memorandum dated 12 April from Lewandowski to several department heads outlined those individuals' respective areas of responsibility with regard to labor relations.[13] This memo substantially reiterates Lewandowski's

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[12] The Respondent has not asserted either before the circuit court or in its statement of position now before the Board that Deans has assumed a more prominent role in negotiations with either the outside unit or the office and clerical unit.

[13] The memo was directed to Williams, Manager of Office Services Steve Glaim, Riffe, Deans, Director of Member Relations and Energy conservation Richard Kavulic, Director of Operations Spencer Cronk, and Assistant Director of Operations Ron Lewis. A description of each of these individuals' responsibilities is set forth, states that all are considered members of the negotiations strategy team if not actually present at the bargaining table, and is apparently meant to limit labor relations responsibilities to those individuals.

description of Deans' duties and concentrates on what Deans' future responsibilities might entail should the office and clerical employees choose union representation. Lewandowski stated that this document was prepared in response to questions raised by the election petition filed in the office and clerical employee unit and was designed to shed light on the status of the secretaries to those department heads.

The Board's long-established test for determining whether an employee possesses confidential status is whether that employee "assist[s] and act[s] in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." *B. F. Goodrich Co.*, 115 NLRB 722, 724 (1956). This is termed the "labor nexus" test and its validity as an appropriate measure of confidential status was endorsed by the Supreme Court in *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170 (1981). Under this definition it is insufficient that an employee may on occasion have access to certain labor related or personnel type information. What is contemplated instead is that a confidential employee is involved in a close working relationship with an individual who decides and effectuates management labor policy and is entrusted with deicisions and information regarding this policy before it is made known to those affected by it. Whether Tate's job was characterized by a relationship of this nature must now be assessed.

Documentary evidence that Tate had access to the Respondent's labor policy formulation is limited to a single memorandum from Supervisor Prahl to Personnel Director Riffe. There is no evidence that Prahl's regular

duties included providing suggestions for bargaining strategies or contract content.[14] Prahl stated that his suggestions were unsolicited, and there is no evidence that the Respondent accorded them any consideration. This one-time voluntary memo is insufficient to qualify Prahl as one who formulates, determines, and effectuates labor relations policies. Moreover, there is no evidence of what other work, if any, Tate performed for Prahl. Based on these facts the working relationship between Tate and Prahl falls far short of displaying confidential characteristics.

Testimonial evidence indicates that during her approximately 8 months of employment with the Respondent, Tate typed three memoranda for Deans dealing with labor or personnel matters[15] and that she took minutes at one management staff meeting (apparently substituting for Williams' absent secretary) concerning the Respondent's production and maintenance employees.[16] Tate's unrefuted testimony establishes that her work did not regularly include labor relations matters. The three

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[14] Prahl was not among the recipients of Lewandowski's 12 April memo directed to all those having labor relations responsibilities.

[15] As stated earlier these memos were not introduced into evidence. They were not described in any more detail than the previous discussion provides.

[16] The minutes were not introduced into evidence. There was no testimony concerning the specific topics discussed at this meeting other than that it involved production and maintenance unit employees.

memos therefore appear more notable by their infrequent nature than by their serving as examples of Tate's typical responsibilities. While Tate's revised job description states that she regularly dealt with confidential labor relations matters, there is no substantiation that this was the case. While this discrepancy may be attributable to the fact that the job description was not prepared by her immediate supervisor, the fact remains that it serves little probative value in assessing Tate's status, standing merely as an uncorroborated statement.[17]

Tate testified that she was unaware of what role Deans played in the conduct of the Respondent's labor relations. Lewandowski's 12 April memorandum outlining various individuals' labor relations responsibilities depicts Deans and six other persons as having significant labor relations involvement. However, much like Tate's revised job description, there is no supporting evidence – testimonial or documentary – that Deans actually held appreciable labor relations responsibility. Deans' account of his labor relations duties was general. He cited his overall responsibility for his department, his attendant role in evaluating employee performance and handling discipline matters, and that he had been requested (during the organizational compaign of the office employees) to make "recommendations on several items related to labor relations." He was not specific in describing the three memos, referred to above, other than by the fact that one dealt with meter readers, another with draftsmen, and a third with field engineers. The only evidence

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[17] Tate's original job description was not discussed on the record nor were the duties of Tate's predecessor.

that Deans took part in the collective-bargaining relationship with the "outside" unit was Williams' recollection that Deans had made a recommendation on the wages of engineering aides. While Lewandowski asserted that Deans had responsibility for handling grievances, Deans did not include this as among his duties nor did he mention typing grievance reports as one of Tate's responsibilities. It appears, therefore, that the array of labor relations responsibilities attributed to Deans in the 12 April memo does not comport with the evidence of what his duties were in practice.

In this case it is incumbent on the Respondent to provide the evidence on which it has based its assertion that Tate is a confidential employee. We conclude that the evidence before us fails to establish that Tate acted in a confidential capacity to anyone having the responsibility of formulating, determining, and effectuating labor policy for the Respondent. Deans' duties have not been shown to have consisted of more than an occasional contribution to possible management decision-making – clearly inadequate to show personal responsibility or regular involvement in the labor policy function. His relationship with Tate, most importantly, fails to exhibit any evidence of sharing of management policy development or entrusting her with information relative to labor relations formulation. A single instance of note-taking at a management meeting and typing three memos of uncertain labor policy content simply are inadequate to provide a basis for finding that Tate served in a confidential capacity for the Respondent. Accordingly, we find that Katherine Tate has not been shown to be a confidential

employee with a labor nexus.[18] We reaffirm the Board's previous Decision and Order.

ORDER

The Board's original Decision and Order is reaffirmed.

Dated, Washington, D.C. 29 October 1985.

Donald L. Dotson, Chairman

Patricia Diaz Dennis, Member

Marshall B. Babson, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[18] In view of our determination of this question it is unnecessary to reach the issue of whether the Act's protections extend to confidential employees.

[APPENDIX E]

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION, Petitioner/Cross-Respondent, v. NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner.	No. 85-2842 (NLRB Case Nos. 27-CA-6151, 27-CA-6280, 27-CA-6305) (277 NLRB No. 3)

ORDER AND JUDGMENT

(Filed November 4, 1988)

Before McKAY, BARRETT and TACHA, Circuit Judges.

In 1981, the National Labor Relations Board found that Intermountain Rural Electric Association had violated sections 8(a)(1), (3), and (5) of the National Labor Relations Act. The petitioner has asked our court to review the Supplemental Decision and Order of the Board.

This case has a complicated procedural history, including a remand from this court on the same issue as now before us. The issue is whether the Board's finding that the secretary to the Director of Engineering is not exempt from coverage under the Act is clearly erroneous. An employee is exempt from coverage under the Act if

she is a person who "assist(s) or act(s) in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." This is generally referred to as the "labor nexus" test. *NLRB v. Hendricks County Rural Elec. Corp.*, 454 U.S. 170, 189 (1981) (*citing with approval B.F. Goodrich Co.*, 115 NLRB 722 (1956)).

In its Supplemental Decision and Order, the Board further elaborated on the "labor nexus" rule:

> Under this definition it is insufficient that an employee may on occasion have access to certain labor related or personnel type information. What is contemplated instead is that a confidential employee is involved in a close working relationship with an individual who decides and effectuates management labor policy and is entrusted with decisions and information regarding this policy before it is made known to those affected by it.

277 NLRB No. 3, pp. 9-10. We conclude that this elaboration of the standard is consistent with *Hendricks* and has a reasonable basis in the law.

The board's summary of the evidence in the case is as follows:

> Documentary evidence that Tate had access to the Respondent's labor policy formulation is limited to a single memorandum from Supervisor Prahl to Personnel Director Riffe. There is no evidence that Prahl's regular duties included providing suggestions for bargaining strategies or contract content.[14] Prahl stated that his suggestions were unsolicited, and there is no evidence that the Respondent accorded them any consideration. This one-time voluntary memo is insufficient to qualify Prahl as one who formulates, determines, and effectuates

labor relations policies. Moreover, there is no evidence of what other work, if any, Tate performed for Prahl. Based on these facts the working relationship between Tate and Prahl falls far short of displaying confidential characteristics.

Testimonial evidence indicates that during her approximately 8 months of employment with the Respondent, Tate typed three memoranda for [Director of Engineering] Deans dealing with labor or personnel matters[15] and that she took minutes at one management staff meeting (apparently substituting for Williams' absent secretary) concerning the Respondent's production and maintenance employees.[16] Tate's unrefuted testimony establishes that her work did not regularly include labor relations matters. The three memos therefore appear more notable by their infrequent nature than by their serving as examples of Tate's typical responsibilities. While Tate's revised job description states that she regularly dealt with confidential labor relations matters, there is no substantiation that this was the case. While this discrepancy may be attributable to the fact that the job description was not prepared by her immediate supervisor, the fact remains that it serves little probative value in assessing Tate's status, standing merely as an uncorroborated statement.[17]

Tate testified that she was unaware of what role Deans played in the conduct of the Respondent's labor relations. Lewandowski's 12 April memorandum outlining various individuals' labor relations responsibilities depicts Deans and six other persons as having significant labor relations involvement. However, much like Tate's revised job description, there is no supporting evidence – testimonial or documentary – that Deans actually held appreciable labor relations responsibility. Deans' account of his labor relations duties was general. He cited his overall responsibility for his department, his attendant role in evaluating employee performance and handling discipline matters, and that he had been

requested (during the organizational campaign of the office employees) to make "recommendations on several items related to labor relations." He was not specific in describing the three memos, referred to above, other than by the fact that one dealt with meter readers, another with draftsmen, and a third with field engineers. The only evidence that Deans took part in the collective-bargaining relationship with the "outside" unit was Williams' recollection that Deans had made a recommendation on the wages of engineering aides. While Lewandowski asserted that Deans had responsibility for handling grievances, Deans did not include this as among his duties nor did he mention typing grievance reports as one of Tate's responsibilities. It appears, therefore, that the array of labor relations responsibilities attributed to Deans in the 12 April memo does not comport with the evidence of what his duties were in practice.

In this case it is incumbent on the Respondent to provide the evidence on which it has based its assertion that Tate is a confidential employee. We conclude that the evidence before us fails to establish that Tate acted in a confidential capacity to anyone having the responsibility of formulating, determining and effectuating labor policy for the Respondent. Deans' duties have not been shown to have consisted of more than an occasional contribution to possible management decision-making – clearly inadequate to show personal responsibility or regular involvement in the labor policy function. His relationship with Tate, most importantly, fails to exhibit any evidence of sharing of management policy development or entrusting her with information relative to labor relations formulation. A single instance of note-taking at a management meeting and typing three memos of uncertain labor policy content simply are inadequate to provide a basis for finding that Tate served in a confidential capacity for the Respondent. Accordingly, we find that Katherine Tate has not been

shown to be a confidential employee with a labor nexus.

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[14] Prahl was not among the recipients of Lewandowski's 12 April memo directed to all those having labor relations responsibilities.

[15] As stated earlier these memos were not introduced into evidence.They were not described in any more detail than the previous discussion provides.

[16] The minutes were not introduced into evidence. There was no testimony concerning the specific topics discussed at this meeting other than that it involved production and maintenance unit employees.

[17] Tate's original job description was not discussed on the record nor were the duties of Tate's predecessor.

We conclude that the Board's summary of the evidence fairly reflects the evidence in the case and that its conclusion based on that evidence that the respondent failed the "labor nexus" test is not clearly erroneous.

Petitioner heavily relies on *Prudential Insurance Co. v. NLRB,* 126 LRRM 3038 (4th Cir. 1987), to support its contention that respondent is a confidential employee with a labor nexus. The evidence in *Prudential* supporting the Fourth Circuit's labor nexus finding is much stronger than in this case. The Fourth Circuit based its finding on two grounds. First, the court concluded that the district manager exercised managerial functions in the field of labor relations. It supported its conclusion with evidence that the district manager

> "generally supervises the day to day operations of the office, operating under general rules set by the home office. He recommends the hiring, firing, and disciplining of the office employees and he may, under certain conditions, fire summarily. He trains

> the local employees, and, within limits set out by the company, makes recommendations as to promotions, increases and allowances." *[NLRB v. Quaker City Life Insurance Co.*, 319 F.2d [690], 692. . . . Additionally . . . Prudential's district manager is the employer's representative at Step One of the grievance procedure. He may respond to Step One or formulate and recommend a response for his superior. He is also responsible for ensuring that Prudential's national labor and personnel policies are carried out in the district office.

126 LLRM at 3041.

Second, the court found that his assistant served in a confidential capacity to him. It based this conclusion on the fact that his assistant's position was described as "confidential" by the company's personnel policy handbook, its job description questionnaire, the district manager, and his assistant herself. 126 LLRM at 3041. In addition, the court found that "her position's confidential characteristics exceed" those of a confidential employee in *Quaker City* who (1) made weekly reports to the home office on day-to-day operations, (2) checked details of new policies before they were submitted to the home office, and (3) was privy to all confidential matters and communications concerning the office including employee performance valuations. *Id.; see* 126 LRRM 3040 for a fuller description of the duties of Prudential's district manager and his assistant.

The difference between the duties of the secretary and her boss here and those in *Prudential* are clearly sufficient to distinguish the results in these two cases.

Therefore, we affirm the Board's finding that the respondent was *not* exempt from coverage under the Act as a "confidential employee."

Entered for the Court

Monroe G. McKay
Circuit Judge

[APPENDIX F]

November 29, 1988

Before Honorable Monroe G. McKay, Honorable James E. Barrett, Honorable Deanell R. Tacha, Circuit Judges

INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION, Petitioner/Cross-Respondent,	)	
v.	)	No. 85-2842
NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner.	)	

This matter comes on for consideration of petitioner's petition for rehearing in the captioned cause.

Upon consideration whereof, the petition for rehearing if denied.

/s/ Robert L. Hoecker
ROBERT L. HOECKER
CLERK

Supreme Court, U.S.
FILED
APR 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1285

In the Supreme Court of the United States

OCTOBER TERM, 1988

INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the National Labor Relations Board's finding that petitioner violated the National Labor Relations Act by suspending and discharging an employee because of her union activities.

2. Whether substantial evidence supports the Board's finding that the affected employee did not act in a confidential capacity to anyone having the responsibility of formulating, determining, and effectuating labor policy for petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

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INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION, PETITIONER

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 62-85) enforcing in part and remanding in part the order of the National Labor Relations Board (the Board) is reported at 732 F.2d 754. The opinion of the court of appeals following the Board's decision on remand (Pet. App. 111-117) is unreported. The original decision and order of the Board (Pet. App. 1-6) and the decision of the administrative law judge (ALJ) (Pet. App. 7-57) are reported at 253 N.L.R.B. 1153. The Board's Supplemental Decision and Order (Pet. App. 96-110) is reported at 277 N.L.R.B. 1.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1988. A petition for rehearing was denied on

November 29, 1988 (Pet. App. 118). The petition for a writ of certiorari was filed on February 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a corporation that provides electric power to communities in Colorado. In early 1979,[1] petitioner's office employees began a campaign to obtain representation by the International Brotherhood of Electrical Workers, Local 111 (the Union). Pet. App. 7, 26. The Union held several meetings at the home of Katherine Tate, who had been hired some months earlier as secretary to Mike Deans, the director of petitioner's engineering department.[2] Tate solicited signatures on union authorization cards at the meetings and at work.

Tate's union activities were "common knowledge" to petitioner (Pet. App. 48, 50, 100) and "a source of discomfort" to her supervisor, Deans, who felt that they were incompatible with her duties as his secretary (*id.* at 49, 50). Petitioner unsuccessfully challenged Tate's inclusion in the bargaining unit, both before and after the union election, on the ground that she was a confidential employee (*id.* at 49). In late June, shortly after Deans had written a letter of recommendation praising Tate's work, Deans was instructed by a superior to keep track of errors in Tate's typing (*id.* at 48 & n.19).

On July 3, Tate was serving as relief switchboard operator in the reception area under the supervision of Spencer Cronk. Several employees were joking with Cronk at the

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[1] All dates referred to are in 1979 unless otherwise noted.

[2] Although she was primarily responsible to Deans, Tate's duties also included general clerical tasks for others in the engineering department, and filling in at the main switchboard when the operator was on breaks (Pet. App. 100-101).

time over a bag of spoiled food deposited in the area by an irate customer. After Cronk declined Tate's request that he remove the food, and Tate threatened to place the bag on his desk, Cronk invited Tate to "go ahead and have a wildcat walkout." Tate "started walking as if to leave the area" (Pet. App. 42), but returned to answer a call when the switchboard began to ring. She arranged for the trash to be removed and finished her shift. *Id.* at 41-42. Cronk left the area and continued to exchange jokes with employees about the spoiled food (Tr. 273-274, 569).[3]

Later that day, Cronk became "somewhat upset" over the incident and reported it to Deans, who informed Tate that she might be suspended. Pet. App. 42. On July 5, Cronk suspended Tate for three days for alleged "acts of insubordination and disrespect for your supervisor * * *." *Id.* at 43.

When Tate returned from her suspension on July 10, she presented to Deans a note from her doctor "strongly" recommending that she be given a one-week leave of absence "because of health problems" (Pet. App. 44). The note was referred to Stanley Lewandowski, petitioner's general manager, who called Tate's clinic to verify the note's authenticity, but "made no effort to speak with the doctor or otherwise ascertain the nature or seriousness of Tate's condition" (*ibid.*). Deans then denied Tate's request for leave, and stated that she would "probably be fired" if she failed to appear for work. Tate left work for one week. Upon her return, she was notified that she had been terminated "for being absent from work without proper authorization." *Id.* at 44-46.

2. The Board, adopting the findings and conclusions of the administrative law judge, found that petitioner had

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[3] "Tr." refers to the transcript of the evidentiary hearing before the ALJ.

violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(3) and (1), by suspending and discharging Tate in retaliation for her union activities. Pet. App. 2, 49-53.

Relying on evidence of petitioner's opposition to the Union, Tate's union activities, and the instruction to Deans to "document any errors" in Tate's work, the Board found that petitioner "was intent upon building a case against Tate, giving colorable validity to a later imposition of sanctions" (Pet. App. 50). It observed that the spoiled-food incident had been viewed by all involved, including Cronk, as an occasion for "general merriment" that was not "of a seriousness warranting any kind of discipline," and held that petitioner's reliance on the episode was merely a "pretext to punish [Tate] for her union involvement" (*id.* at 50-51). Similarly, the Board found that petitioner had an "ulterior motive" for discharging Tate and that "the stated reasons for denying the leave of absence are unconvincing, indicating that the denial was in the expectation that Tate nevertheless would follow the doctor's recommendation[,] thereby presenting [petitioner] with a sure-fire chance to terminate her" (*id.* at 51-52).[4]

The Board rejected petitioner's defense that Tate was a confidential employee, noting earlier determinations to the contrary in the representation hearings (Pet. App. 49

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[4] Petitioner's stated reasons for denying Tate's sick-leave request were that Deans could not spare her because work had accumulated during her suspension, and that he and Lewandowski doubted Tate's sincerity in claiming a health problem (Pet. App. 44-45). The Board found that the backlog of work was not a legitimate reason for denying the request because it was created by petitioner's unlawful suspension of Tate (*id.* at 2 n.1). It found that any asserted doubt as to Tate's sincerity was unconvincing in light of Lewandowski's failure to inquire about Tate's medical condition during his phone call to Tate's clinic (*id.* at 51).

n.20). The Board concluded that, even if she were a confidential employee, she would still be protected by the Act against discrimination due to her union activities (*ibid.*).[5] It ordered that Tate be offered reinstatement with back pay and made whole for any loss resulting from her suspension and discharge (*id.* at 6).

3. The court of appeals found that substantial evidence supported the Board's findings with respect to Tate's suspension and discharge (Pet. App. 69-73). It upheld the Board's conclusion that petitioner's proffered reasons for its actions were pretextual and that petitioner's sole motive was to punish Tate for her union involvement (*id.* at 72). Accordingly, the court rejected petitioner's contention that the Board had erred by failing to state its findings in terms of the *Wright Line*[6] analysis applicable to dual-motive discharges (*id.* at 72-73). The court remanded to the Board for specific findings as to whether Tate was a confidential employee under the Board's "labor nexus" test, upheld by this Court in *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 189-190 (1981), and if so, whether she nonetheless would be protected by the Act (Pet. App. 78-79, 85).

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[5] The Board further found that petitioner had committed numerous other unfair labor practices and had violated Section 8(a)(3) and (1) of the Act by disciplining Kathleen Gunton, a union activist, who, at Tate's request, had attended the July 3 meeting in Dean's office (Pet. App. 15-34, 39-41, 52-53). On appeal, the court affirmed the Board's determination as to Gunton and enforced the Board's order with respect to the other violations (*id.* at 63-64, 79-85). Petitioner does not now seek further review of these rulings. See also n.7, *infra*.

[6] *Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

Petitioner's petition for a writ of certiorari was denied by this Court, No. 84-217 (Oct. 24, 1984).[7]

4. On remand, the Board reviewed the record evidence[8] in light of its "long-established test for determining whether an employee possesses confidential status," *i.e.*, whether that employee " 'assist[s] and act[s] in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.' " Pet. App. 106 (quoting *B.F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956)). The Board noted that this "labor nexus" test had been endorsed by the Supreme Court in *NLRB* v. *Hendricks* "as an appropriate measure of confidential status" (Pet. App. 106). The Board explained that (*ibid.*):

> [u]nder this definition it is insufficient that an employee may on occasion have access to certain labor related or personnel type information. What is contemplated instead is that a confidential employee is involved in a close working relationship with an individual who decides and effectuates management labor policy and is entrusted with decisions and information regarding this policy before it is made known to those affected by it.

Applying this standard, the Board observed that Deans' duties were "inadequate to show personal responsibility or

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[7] Petitioner sought review by this Court of the Board's alleged failure, with respect to both Tate and Gunton, to apply the *Wright Line* analysis (Pet. 2). In its brief in opposition, the Board stated that, in light of the court of appeals' remand, the issue as to Tate was not yet ripe for review. Since petitioner made the identical argument as to both Gunton and Tate, the Board nevertheless addressed petitioner's contentions as to both employees. (84-217 Gov't Br. in Opp. at 8 n.8 and *passim*.)

[8] On remand, no party requested a further evidentiary hearing (Pet. App. 100 n.5).

regular involvement in the labor policy function," and that his relationship with Tate "fail[ed] to exhibit any evidence of * * * entrusting her with information relative to labor relations formulation" (Pet. App. 109).[9] Accordingly, the Board held that Tate had not been shown to be a confidential employee with a labor nexus, and reaffirmed its original decision (*id.* at 109-110).

5. The court of appeals agreed with the Board and enforced its order (Pet. App. 111-117). The court concluded that the Board's "elaboration" of its labor nexus standard, see *id.* at 112 (quoting *id.* at 106), was consistent with this Court's decision in *Hendricks,* and had a reasonable basis in law. The court found that substantial record evidence supported the Board's findings concerning the responsibilities of Tate's supervisors and Tate's relationship to

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[9] The Board discounted Tate's job description, revised during the time petitioner was contesting Tate's status, and a company memorandum describing Deans' responsibilities (written during the same period). It observed that the references in those documents to Deans' labor responsibilities and Tate's confidential tasks with respect to labor relations matters were unsupported by any other evidence, and were inconsistent with Tate's unrebutted testimony as to the nature of her relationship with Deans and the information to which she had access (Pet. App. 100-106). The Board also discounted testimony that Tate had allegedly typed "labor confidential" memoranda for Deans, noting that none of these memos had been offered in evidence. It also observed that the examples of her work that were introduced related almost without exception to petitioner's business operations, and that the only document in evidence bearing on "labor policy" had been typed by Tate at the request of Richard Prahl, a supervisory engineer who had no labor relations responsibilities, and who expressed his suggestions in an unsolicited, unprecedented, and never repeated memorandum (*id.* at 103-104, 107). In conclusion, the Board stated that "a single instance of note-taking at a management meeting and typing three memos of uncertain labor policy content simply are inadequate to provide a basis for finding that Tate served in a confidential capacity for [petitioner]" (*id.* at 109).

them, and its conclusion that petitioner had "failed [to meet] the 'labor nexus' test" (*id.* at 115). The court distinguished the finding of labor nexus confidentiality in *Prudential Insurance Co.* v. *NLRB,* 832 F.2d 857 (4th Cir. 1987), explaining that "the differences between the duties of the secretary and her boss here and those [of the secretary and the district manager] in *Prudential* are clearly sufficient to distinguish the results in this case" (Pet. App. 115-116).

ARGUMENT

1. Petitioner argues (Pet. 14-23) that the Board erred in failing to apply its method set forth in *Wright Line* for analyzing dual-motive discharges of employees engaged in union activity. This fact-bound contention was properly rejected by the court of appeals in a decision that does not conflict with the decisions of this Court or any other court of appeals.

In *NLRB* v. *Transportation Management Corp.,* 462 U.S. 393 (1983), this Court approved the Board's allocation of proof set forth in *Wright Line* for determining the lawfulness of disciplinary action in dual motive cases. Under this approach, an employer who is shown to be motivated in part by anti-union animus can defend against an unfair labor practice charge by proving that "the worker would have been fired even if he had not been involved with the union." *NLRB* v. *Transportation Management Corp.,* 462 U.S. at 395.

A case is properly classified as "dual motive" if the employer has both valid and invalid reasons for disciplining an employee. However, not every case in which the employer asserts that its motive was legitimate requires formal analysis under *Wright Line.* The Board in *Wright Line*

recognized that "an employer will rarely, if ever, baldly assert that it has disciplined an employee because it detests unions," but will "generally advance what it asserts to be a legitimate business reason for its action." 251 N.L.R.B. at 1083-1084. Only if the evidence indicates that a legitimate economic motive contributed in part to the employer's decision must the Board then determine whether the employer's lawful reason would, in any event, have resulted in the discharge.

But where, as here, the employer's "asserted justification is a sham in that the purported rule or circumstance advanced * * * was not, in fact, relied upon[,] * * * the reason advanced by the employer may be termed pretextual." *Wright Line,* 251 N.L.R.B. at 1084. In such a case, "[s]ince no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive." *Ibid.* The Board's finding in this case that the employer's asserted reasons for disciplinary action were pretextual obviates the need to engage in dual motive analysis under *Wright Line. Ibid.* See also *Limestone Apparel Corp.,* 255 N.L.R.B. 722 (1981), enforced, 705 F.2d 799 (6th Cir. 1982); *Babcock & Wilcox Co.,* 257 N.L.R.B. 707, 707 n. 1 (1981); *NLRB* v. *American Geri-Care, Inc.,* 697 F.2d 56, 63-64 (2d Cir. 1982) ("Once a finding of pretext is made, and is supported by substantial evidence in the enforcement proceeding, the adjudication is complete and neither the Board nor the Court need engage in the *Wright Line* analysis."), cert. denied, 461 U.S. 906 (1983); *NLRB* v. *Charles Batchelder Co.,* 646 F.2d 33, 38-39 (2d Cir. 1981) ("but for" analysis under *Wright Line* is unnecessary where "the Board found that the impermissible ground was the *only* basis for the Company's action and that the ostensible justifications offered by the Company * * * were merely pretextual") (emphasis

added); *The Artra Group* v. *NLRB,* 730 F.2d 586, 591-592 (10th Cir. 1984).[10]

Petitioner's argument that the Board erred by failing to apply *Wright Line* thus rests entirely on the claim that the Board's findings of pretext were not supported by substantial evidence. This factual issue does not warrant further review. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490-491 (1951).[11]

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[10] As the Board in *Wright Line* recognized, "the distinction between a pretext case and a dual motive case is sometimes difficult to discern" because "the appropriate designation seldom can be made until after the presentation of all relevant evidence." *Wright Line,* 251 N.L.R.B. at 1084 n.5. Here, the Board made the "appropriate designation" by judging that the business reasons alleged by petitioner played *no* part in the decision and that petitioner's decision was entirely motivated by anti-union animus.

Thus, petitioner's contention that the "*Wright Line* analysis in dual motive cases * * * is *mandatory*" (Pet. 16 (emphasis in original)), misses the point. In finding that petitioner's asserted reasons were pretextual, the Board determined that, in fact, petitioner's *sole* motive was unlawful. No additional analysis was required to establish a violation of the Act. See *NLRB* v. *Transportation Management Corp.,* 462 U.S. at 398 ("it is undisputed that * * * if the reasons [the employer] proffers are pretextual, the employer commits an unfair labor practice").

[11] There is no merit in petitioner's contention that cases in other circuits conflict with the appeals court's decision (Pet. 16-23). With the exception of *Lawson Co.* v. *NLRB,* 753 F.2d 471 (6th Cir. 1985), the record in each case established that the employer actually relied on lawful reasons in taking adverse action against the employee. In *Lawson,* the court determined that the Board erred by relying exclusively on evidence of strong anti-union animus without analyzing the company's defense that it would have granted benefits even had there been no upcoming union election. In the instant case, in contrast, the Board fully considered petitioner's claim of a lawful motive and found that it was pretextual.

In addition, petitioner's reliance (Pet. 23) on cases in which this Court vacated and remanded for reconsideration in light of *Transpor-*

2. Petitioner contends (Pet. 25) that the court of appeals ignored "overwhelming evidence of labor nexus" in enforcing the Board's determination that Tate was not a confidential secretary. The Board found that Deans did not have "personal responsibility or regular involvement in the labor policy function," and, most important, did not "entrust[] [Tate] with information relative to labor relations formulation" (Pet. App. 109). Petitioner's quarrel with the Board's factual findings, upheld by the court of appeals (*id.* at 115), does not merit further review. *Universal Camera Corp.* v. *NLRB, supra.*[12]

Petitioner also cites the Board's decision in *B.F. Goodrich,* 115 N.L.R.B. 722 (1956), for the proposition that "it is sufficient that any employee may *on occasion* have access to certain labor related or personnel type information." See Pet. 27. In fact, the Board in that decision expressly repudiated a test for confidential status that encompassed those with mere access to labor relations information, and stated its "intention * * * to limit the term 'confidential' so as to embrace only those employees who assist and act in a confidential capacity" to managers involved in labor policy. 115 N.L.R.B. at 724. The other cases cited by petitioner (Pet. 27-29) make clear that oc-

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tation Management Corp. is misplaced. In those cases, the courts of appeals had held the Board to a more stringent burden of proof than the *Wright Line* approach requires. Accordingly, after this Court approved the *Wright Line* standard, it granted the Board's petitions and directed the courts of appeals to apply the correct legal rule.

[12] Similarly, petitioner's assertion (Pet. 25-27) that the court of appeals improperly distinguished the facts in this case from those in *Prudential Insurance Co.* v. *NLRB,* 832 F.2d 857 (4th Cir. 1987), involves only the application of settled principles to particular facts, and presents no issue appropriate for consideration by this Court.

casional access to labor-confidential material does not satisfy the labor nexus test. See, *e.g., Hendricks,* 454 U.S. at 189 (test includes only those employees who "regularly have access" to labor-confidential information); *NLRB* v. *Allied Products Corp.,* 548 F.2d 644, 648-649 (6th Cir. 1977) (evidence showed that a secretary regularly typed all of the labor-relations paperwork generated by chief labor relations administrator).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

October Term, 1988

INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY TO BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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PETITIONER'S REPLY TO BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARGUMENT

Respondent argued to the Tenth Circuit that the Board's decision in this case was consistent with *Wright Line Inc.*, 251 N.L.R.B. 1083 (1980), because pretextual reasons for discrimination do not rebut a *prima facie* showing of discriminatory intent. Now Respondent argues that the *Wright Line* analysis does not apply at all here because of the Board's "finding" in this case that Petitioner's asserted reasons for terminating Tate were

pretextual. Respondent apparently has revised its position in an attempt to excuse the Board's failure to apply *Wright Line* in this case, while at the same time seeking to re-cast the issue on appeal in terms of whether there exists substantial evidence to support the Board's "finding."

Respondent's Brief in Opposition urges affirmation of a two-tiered approach to dual motive cases not contemplated by the *Wright Line* decision itself or by this Court in *N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393 (1983). According to Respondent there exists one class of cases, denominated "pure dual motive cases" in which the employer's affirmative defense that it had legitimate, non-discriminatory reasons for its actions is considered on its merits. A second class of cases, so-called "pretext" cases, does not require consideration of an employer's affirmative defense that it had legitimate, non-discriminatory reasons for its actions. Respondent contends this is a "pretext" case, therefore, inquiry into the issue of whether there was cause for Tate's discharge is foreclosed by the Board's "finding" of pretext.

The *Wright Line* decision does not support the distinction now advanced by Respondent. Although the Board in *Wright Line* discussed the difference between pretext and dual motive in Part I of its decision, it did so because the distinction was "useful in setting forth the controversy surrounding dual motive cases." *Wright Line*, 251 N.L.R.B. at 1083 n. 4. The *Wright Line* opinion repeatedly states that the Board's adoption of the *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), analysis was intended to do away with any need to distinguish between pretext and dual motive

cases.[1] The Board adopted the *Mount Healthy* test in part to provide an employer "with a formal framework within which to establish its asserted legitimate justification." 251 N.L.R.B. at 1089.

Respondent implies this Court gave its *imprimatur* to the pretext-dual motive distinction when it approved the Board's *Wright Line* analysis in *Transportation Management Corp., supra. Transportation Management Corp.* approved the Board's adoption of a *Mount Healthy* test where an employer asserts a non-discriminatory reason for its action; in no way does that decision endorse the out-of-hand rejection of an employer's asserted justification for its actions outside the *Mount Healthy* framework. In *Transportation Management Corp.* this Court held that Section 10(c) of the National Labor Relations Act does not forbid shifting the burden to an employer to prove that, absent improper motivation, it would have acted in the

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[1] The *Wright Line* decision states:

"As is demonstrated herein, under the *Mount Healthy* test, there is no real need to distinguish between pretext and dual-motive cases."

251 N.L.R.B. at 1083 n. 4.

"The conceptual problems to which this sometimes blurred distinction [between pretext and dual-motive cases] gives rise can be eliminated if one views the employer's asserted justification as an affirmative defense."

251 N.L.R.B. at 1084 n. 5.

"Still an additional benefit which will result from our use of the *Mount Healthy* test is that the perceived significance in *distinguishing between pretext and dual-motive cases will be obviated.*"

251 N.L.R.B. at 1089 n. 13 (emphasis added).

same manner for wholly legitimate reasons. However, the Court did not approve a rule foreclosing an employer from meeting that burden solely because of the volume of evidence showing anti-union animus, which rule the National Labor Relations Board and the Tenth Circuit followed in this case.

Section 10(c) of the National Labor Relations Act directs that no order of the Board may reinstate or compensate any employee who was terminated for cause. The *Wright Line* analysis was consistent with the mandate of that provision in that it afforded employers the opportunity to demonstrate that an employee had been terminated for cause, irrespective of any anti-union animus. The "pretext" analysis advanced by Respondent and endorsed by the Tenth Circuit in this case precludes inquiry into the issue of cause and denies employers the benefit of the defense mandated by *Wright Line* and *Transportation Management Corp.* In *Wright Line* the Board declared that "we shall henceforth employ the [*Mount Healthy*] test *in all cases* alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. 251 N.L.R.B. at 1089 (emphasis added). Now the Board seeks to deny Petitioner its right to justify its conduct, in complete disregard of its obligation not to reinstate employees terminated for cause.

In this case Respondent urges that the Board "judged" Petitioner's explanation pretextual, yet there was no determination whether other employees would have been denied leave under similar circumstances or whether other employees would have been terminated if they had taken an unauthorized leave after being

directed to report to work.[2] The evidence relied upon by the Board and the Court of Appeals as proof of pretext is simply evidence of general anti-union animus.

The Sixth Circuit has unequivocally rejected the Board's position that a *prima facie* showing of anti-union animus may be so strong that rebuttal evidence proferred by an employer can be rejected without reference to the *Wright Line* analysis. *Lawson Company v. N.L.R.B.*, 753 F.2d 471, 476 (6th Cir., 1985). Respondent correctly notes that at least one Circuit, however, has held that *Wright Line* may be dispensed with upon a "finding" of pretext. *N.L.R.B. v. American Geri-Care, Inc.*, 697 F.2d 56, 63-64 (2nd Cir., 1982), *cert. denied*, 461 U.S. 906 (1983). This conflict should be addressed by this Court.

The analysis employed by the Tenth Circuit here and urged by Respondent resulted in an illusory "finding" of pretext based solely on evidence of anti-union animus, without consideration of whether there was independent cause for termination. One consequence of this analysis is that employees terminated for cause may be reinstated without consideration of their misconduct, simply upon the Board's designation of pretext. Such an analysis would not be permitted in the Sixth Circuit and should

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[2] The employee in this case requested a week's leave, which was denied. Subsequently she produced a doctor's note saying she should be excused from work during that week. When her supervisor rejected this transparent ploy and directed her to report to work that week, she refused to do so. It has never been suggested that this insubordination would not ordinarily constitute just cause for termination. Indeed, the administrative law judge characterized this conduct as presenting a "sure-fire chance to terminate Tate." (App. 51).

not be allowed elsewhere, as it is not consistent with the Board's own *Wright Line* standards.

CONCLUSION

This case brings into focus the Board's resurrection of the old distinction between pretext and dual motive, a distinction which was "obviated" by *Wright Line,* 251 N.L.R.B. at 1089 n. 13, and a distinction the Sixth Circuit certainly rejects. Here the Court has an opportunity to rule once and for all that when the National Labor Relations Board adopted the *Wright Line* test for *all* Section 8(a)(1) and 8(a)(3) cases turning on employer motivation, the artificial distinction between pretext and dual motive was abolished. The Board admits that it failed and refused to apply the *Wright Line* analysis in this case. The Tenth Circuit's approval of that failure was error. Accordingly, Petitioner's application for a Writ of Certiorari should be granted.

Respectfully submitted,

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